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I

REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

S. J. VANKOUGHNET,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

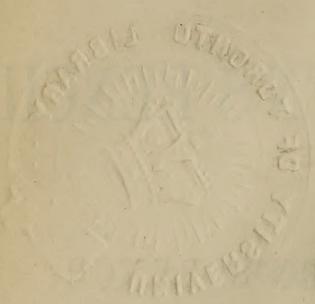
EDITOR.

VOL. XLVI.

CONTAINING THE CASES DETERMINED
FROM FEBRUARY 7, 1881, TO FEBRUARY 18, 1882,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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ROWSSELL & HUTCHISON.
1882.

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U.C.Q.B. : V.146

J U D G E S
OF THE
COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN HAWKINS HAGARTY, C. J.
“ “ JOHN DOUGLAS ARMOUR, J.
“ “ MATTHEW CROOKS CAMERON, J.

Attorney-General :
THE HON. OLIVER MOWAT.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

HILARY TERM, 44 VICTORIA, 1881.

From February 7th to February 19th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

LUMSDEN ET AL. V. DAVIS.

Sale of goods—Condition as to re-sale—Statute of Frauds—Amendment.

Defendant sold to plaintiffs a quantity of tea, agreeing that if there was any left on plaintiffs' hands at a certain date, he would take it back at the advanced price of ten cents per pound. *Held*, an entire agreement consisting of one conditional contract of sale, and not of two contracts; and that consequently the delivery of the goods by the defendant satisfied the Statute of Frauds, and the plaintiffs were entitled to recover, for defendant's refusal to take back the quantity left unsold.

The plaintiffs applied at the trial to amend their declaration by striking out a term of the bargain therein alleged, but not proved, that the plaintiffs would sell as much of the tea as they could. *Held*, an amendment which was imperative under R. S. O. ch. 50, sec. 270.

The first count of the declaration alleged a sale by the defendant to the plaintiffs of a quantity of teas, upon an agreement that the plaintiffs would endeavour to sell, in the ordinary course of their business, as much of the said

tea as they could, on or before the 1st day of February, A.D. 1880, and that the defendant would buy back from the plaintiffs so much of the said tea as then remained unsold, at an advance of ten cents per pound upon the price at which the defendant had sold the same to the plaintiffs; a delivery of to and an acceptance by the plaintiffs of the said tea, and an endeavour by the plaintiffs to sell as much as they could, and a sale of part: that a large quantity remained unsold on the 1st day of February, 1880; a refusal by the defendant to buy back the same at the said advance, and an averment of performance of conditions precedent. The second count was the same in effect. The subsequent counts were the common counts.

Pleas. 1. Did not promise. 2. That the alleged quantity did not remain unsold on the 1st day of February, 1880. 3. To the common counts, never indebted and payment.

Issue.

The cause came on for trial before Galt, J., without a jury, at the last Winter Assizes at Hamilton.

One of the plaintiffs proved the bargain made by him with the defendant for the tea in question, to be as follows: The defendant said to him, "Mr. Lumsden, if you buy these teas from me, I will give you ten cents advance on every pound of teas you have in stock next February, and I will put it in writing if you like." The plaintiff answered: "Mr. Davis, we would be fools if we did not accept it," and we accepted it. It was not put in writing, but the teas were delivered by the defendant to the plaintiffs upon this agreement. So many pounds remained unsold in February, and the defendant refused to buy them back. This bargain was also proved by another of the plaintiffs and by one Allan, an agent of the defendant, who assisted the defendant to make the sale to the plaintiffs.

At the close of the plaintiffs' case, the plaintiffs' counsel moved to amend the declaration by striking out the term of the bargain therein alleged, that the plaintiffs would

endeavour to sell, in the ordinary course of their business, so much of the said tea as they could. The amendment was refused. The defendant's counsel then moved for a nonsuit, on the ground that the contract was contained in the invoice and the letters, that the agreement for a re-sale was within the Statute of Frauds, and there was no writing or any other evidence to satisfy the statute, referring to *Watts v. Friend*, 10 B. & C. 445. The learned Judge thereupon nonsuited the plaintiffs.

February 7, 1881. *Osler*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiffs for such sum as the Court might think just, or for a new trial, on the ground that the evidence justified a finding for the plaintiffs; and to amend the declaration if necessary, as asked at *Nisi Prius*.

February 17, 1881. *Ferguson*, Q. C., shewed cause. The nonsuit was properly entered at the trial. In each count of the plaintiffs' declaration it is alleged, as part of the contract on which the suit is brought, that the plaintiffs were to endeavour to sell the tea in question in the usual way in their business, and that the defendant would receive back from them so much of the tea as they (the plaintiffs) might have on hand unsold, by the 1st of February following. The performance of conditions precedent is alleged generally in each count, and there is a specific allegation in each count of the performance of this condition, or part of the agreement. Upon the evidence it is entirely plain, indeed it is admitted by the plaintiffs themselves, that they did not so endeavour to sell the tea, but, on the contrary, refused to sell it unless at a profit of ten cents per pound, which the evidence shews would be an extraordinary profit for the plaintiffs, who were wholesale dealers and jobbers in tea. There was therefore plainly this condition precedent unperformed, and the nonsuit was right, as the plaintiffs did not make out their case. The amendment asked for at the trial, and refused, should not be allowed now. The agreement alleged is an extraordinary

one, and it is very improbable that it was ever made. The defendant was prepared to deny it had he had an opportunity of so doing. The statements of the plaintiffs were incredible, and were not believed at all by the learned Judge before whom the cause was tried. The source from which the pleader obtained his information must be assumed to be the plaintiffs themselves, and their statement now is entirely different from what is set forth in the declaration. It was contended by counsel for the defendant at the trial, that certain documents produced shewed that the agreement between the parties had been reduced to writing, and the parol evidence was received notwithstanding his objection. If this contention was correct, as it is now contended it was, it was plain that the plaintiffs could not recover, and the nonsuit can be supported on this ground. If the true meaning of the transaction alleged is that there were two agreements, one for the sale of the tea to the plaintiffs, and another for the purchase back of a portion of it in certain events, then the plaintiffs could not recover for the want of a writing to evidence the agreement on which the defendant was sued. It is contended that such is the true meaning of the transaction. This ground was taken by the defendant's counsel at the trial, and the nonsuit can be sustained upon it. It is not a case of a single contract and condition, but of two contracts, and the 17th section of the Statute of Frauds has not been satisfied in respect of the contract on which the suit has been brought. *Williams v. Burgess*, 10 A. & E. 499, and *Watson v. Friend*, 10 B. & C. 446, illustrate the difference between the two kinds of contracts referred to. In any case there can only be a new trial, as the defendant's evidence has not been given at all.

Osler, Q.C., contra. The evidence was uncontradicted, and supports the declaration, even without amendment, but the amendment ought to have been allowed. The Judge at Nisi Prius refused to allow it only because he was of opinion that the evidence did not disclose a cause of action. The contract for the sale, and the re-purchase of tea in

stock in February, was one contract, and the original delivery of the tea took the whole of the agreement out of the statute: *Williams v. Burgess*, 10 A. & E. 499; *Fay v. Wheeler*, 44 Verm. 292; *Dickinson v. Dickinson*, 29 Conn. 600. The case of *Watts v. Friend*, 10 B. & C. 446, is distinguishable, as there the goods, contingently to be delivered, were not the same as those the delivery of which was the immediate subject of sale.

March 11, 1881. ARMOUR, J.—In *Watts v. Friend*, 10 B. & C. 446, A. verbally agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at a certain price per bushel. A. supplied the seed, and B. sowed it on his own land, and harvested the crop, but refused to sell it to A. at the price named. A. sued B. for breach of this contract, and it was held that A. could not recover because the case came within the 17th section of the Statute of Frauds.

In *Williams v. Burgess*, 10 A. & E. 499, A. by a verbal agreement sold to B. a mare supposed to be in foal, for £20, subject to the condition that if it should prove to be in foal, B. should, on receiving £12 from A., return it on request. A. delivered the mare to B., and received the £20. On its proving to be in foal, he tendered to B. £12, and requested him to return the mare, which B. refused to do, and A. brought suit. It was held that this case was not within the 17th section of the Statute of Frauds. Lord Denman, C. J., said: "This is a sale by the plaintiff to the defendant on particular terms, one of which is a return of the article sold in a certain event; the acceptance of the thing sold takes the whole contract out of the statute. The case differs from *Watts v. Friend*, where the re-sale was of a different thing." Littledale, J., said: "The plaintiff is willing to part with his property on certain conditions, which are part of the agreement. It is not an independent contract of sale on which he sues, but the original contract, which was a qualified sale. It is like the case of the delivery

of a horse on trial; when the buyer returns it, after trial, it is not a re-sale. I have not the slightest doubt on the case." Patteson, J., said: "It is one entire contract, and not two distinct contracts. It is a sale on the terms that the mare and part of the price should be returned in a certain event. If indeed the defendant had agreed to sell to the plaintiff the foal, the case might have been different. In *Watts v. Friend*, the bargain was to sell to the plaintiff an entirely different thing, and not merely to return to him the same article."

Mr. Benjamin, in his work on Sales, at page 129, 2nd ed., thus summarizes the law: "So, where there was a verbal contract of sale, by the terms of which the thing was to be re-sold to the vendor at a fixed price in a particular event, the acceptance by the purchaser in the first instance takes the whole agreement, as an entire contract, out of the statute, and he cannot object, when afterwards sued on the stipulation for the re-sale, that this contract was not in writing, and that there had been no acceptance nor actual receipt."

The contract in the present case was an entire contract, one of the terms of which was, that the defendant should buy back such portion of the tea as remained unsold in February, at an advance of ten cents per pound upon the price which the plaintiffs had paid him for it; and there having been a delivery by the defendant to the plaintiffs of the tea, and an acceptance thereof by the plaintiffs, the whole contract was taken out of the Statute of Frauds.

I think, therefore, that the nonsuit was wrong, and should be set aside.

We have nothing to do with the question whether the contract was a beneficial one or otherwise for either of the parties making it; it is sufficient for us to say that the plaintiffs' witnesses established it, and that it is a contract upon which the law enables them to maintain an action.

If an amendment of the declaration was required, I think the amendment asked was one which the learned Judge was bound to make under R. S. O. cap. 50, sec. 270.

The rule will therefore be absolute to set aside the non-suit, and for a new trial without costs.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule absolute.

JAMES PATTERSON V. ARCHIBALD C. THOMPSON.

Distress—Exemption of goods in the way of trade.

The exemption from distress of goods entrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade.

In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by defendant.

Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber; and that the plaintiff was entitled to recover, notwithstanding that one of the tenants of the saw-mill appeared to have an interest with him in the saw-logs.

REPLEVIN to try the right to 100,000 feet of lumber and twenty-one saw logs, distrained by the defendant on certain premises occupied by one Thomas Matthewson and Robert D. Patterson, as tenants of the defendant, for arrears of rent.

The case was tried before Osler, J., at the last Fall Assizes for the County of Simcoe, held at Barrie, without a jury, and turned upon the questions whether the property was the plaintiff's, and, if so, was it exempt from distress, on the ground that the tenants Matthewson and Patterson were carrying on the business and trade of saw-millers, and the lumber had, in the shape of saw logs, been delivered by the plaintiff to them, to be sawed in their said business for him for reward to them in that behalf.

The defendant avowed the taking of the lumber and logs as a distress for rent due by Matthewson and Patterson, and the plaintiff pleaded that he delivered the logs to the said tenants to be sawed and manufactured into lumber for him, in the way of their trade and business, for certain wages in that behalf, and before the re-delivery the defendant distrained the lumber and logs.

Issue.

The evidence in the opinion of the learned Judge was conflicting as to whether the tenant Matthewson was not jointly interested in the logs with the plaintiff, and he adopted the view that Matthewson was interested therein, and entered a verdict for the defendant.

November, 1880, *Lount*, Q. C., obtained a rule *nisi* to set aside the verdict and enter it for the plaintiff, in pursuance of the Common Law Procedure Act, on the ground that the said verdict was contrary to law and evidence, and the weight of evidence in this, that the evidence shewed that the lumber and logs claimed in the declaration were the property of the plaintiff, and not the property of Thomas Matthewson and Robert D. Patterson, in the pleadings mentioned, and the said property was not subject or liable as a distress for rent, as in the defendant's third plea (?avowry) alleged.

February 8, 1881, *McCarthy*, Q. C., shewed cause. The business of saw-milling is not of such a nature that it requires the same protection as, for instance, that of a blacksmith. Matthewson being a tenant of the premises with one of the Pattersons, and having an interest in the goods, they were liable for the rent, and upon the evidence the learned Judge's finding was right.

Lount, Q. C., contra. It was of no consequence whether the property was that of Matthewson and Patterson or that of Patterson alone, as if it was the former's, it was taken to the mill in the way of trade, and so exempt; and if Patterson's alone, it was clearly exempt. The authorities shew that sawmilling is a trade within that class of

cases which exempt from distress articles taken to the mill for the purposes of trade.

The cases cited are referred to in the judgments.

March 11, 1881. CAMERON, J.—Neither at the trial nor on the argument of the rule did the counsel for the plaintiff present the question whether the logs having been delivered to Matthewson and Patterson in the way of their trade, to be sawed and manufactured into lumber, they would be exempt from distress, though Matthewson had in fact been interested therein jointly with the plaintiff; and on the question being asked by the Court, the defendant's counsel answered that case was not presented on the record, the plea to the defendant's avowry merely alleging the logs were the logs of the plaintiff.

The decision of the case depends upon the correct answers to be given to two questions: First—Is the business of sawing lumber for hire such a trade or business as exempts the property of strangers brought to the premises where the business is alleged to be carried on to be converted into lumber, from distress for rent.

In *Lyons v. Elliott*, L. R. 1 Q. B. D., at page 215, Lush, J., thus states the law on this point: "*Primâ facie* any goods found on the demised premises are distrainable for rent. The law for the benefit of of trade makes certain exceptions; thus, implements of trade are not distrainable, if there is other sufficient distress upon the premises; this is a qualified exemption. In other cases the exemption is absolute, such as arises in the regular course of business. Thus, goods sent to persons exercising a public trade, while they are on the premises in which that public trade is carried on, are privileged from distress for the benefit of trade; such as cloth sent to a tailor, a horse to a farrier, corn to a mill," In the same case, page 213, Blackburn, J., said: "No doubt the general rule at Common Law was, that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress

till the rent was paid or the service performed. This state of the law produced no harm, because at Common Law the landlord not being able to sell the distress, he generally gave up the goods as soon as he found they were not the tenant's, as his continuing to hold them would not induce the tenant to pay. But in the reign of William and Mary a very harsh and unjust law (2 Wm. & M. s. 1, ch. 5,) was passed, by which the right was given to the landlord to sell any goods seized, and to apply the proceeds to the payment of the rent, unless the tenant or owner of the goods first paid it; and this held out a great temptation to a landlord to seize the goods of a stranger, although he knew that they were not the tenant's. That is why I doubt whether the reason sometimes assigned for the privilege of goods intrusted to persons exercising certain trades, that they presumably do not belong to the tenant, is the real one. The ground of the privilege is public policy for the benefit of trade; and the privilege is given to the person carrying on the trade; that is, where goods are entrusted to a person in order that he may exercise his trade upon them, they should be privileged from distress at the suit of the landlord of the premises where the trade is exercised. * * * The principle is, that when a person occupies certain premises and carries on a public trade there, goods which are brought to those premises for the purposes of that trade are privileged."

There can be no doubt that in this country a saw mill is of as much importance in the interests of the public and trade as a corn mill, and that the exemption from distress should exist in the one case as well as the other. Then upon the facts, as there is no doubt the logs were taken to the saw mill to be converted in the due course of the business of the mill into lumber, either for the plaintiff alone or for the plaintiff and Matthewson, the first question must be answered in favour of the plaintiff.

As to the second question, the same answer must be given, assuming that the view of Mr. Justice Blackburn, as above set out, is correct, that "the privilege is given

to the person carrying on the trade." The logs, and the produce thereof in the shape of lumber, having been taken to the premises of Matthewson and Patterson in order that their business might be exercised thereon, became exempt from distress, that is, the plaintiff's goods, or goods that the plaintiff was interested in, having been taken to the demised premises for the purpose aforesaid, became at Common Law exempt or privileged from distress.

In *Ex parte Parke, In re Potter*, L. R. 18 Eq. 381, it was held where two mortgagors attorned and became tenants to the mortgagees, each for an undivided moiety of the mortgaged premises, at a separate rent for each moiety of £50 a year, as being the amount payable as interest, and the rent of both tenants fell in arrear, bricks owned by the tenants jointly in their business of brick-makers carried on upon the mortgaged premises, were not liable to be distrained, because, as I take that case in effect to decide, the goods of the tenant of one undivided moiety being on the demised land were not liable to be distrained upon for the other tenant's rent, and the fact that such other tenant had an interest in the goods made no difference as to his co-tenant's rights. Sir James Bacon, C. J., in giving judgment, at p. 385, said: "The contract between the parties, and the law which follows upon the contract, give the landlord a right to take everything upon the entire estate which belongs to Potter," (one of the tenants.) "He may roam over the whole of the joint estate, and if he can find a horse, a sheep, or any other chattel with regard to which the title of Potter can be plainly made out, he has a right to take it. It is a totally different question whether he has a right to take chattels in which Potter, if he has any interest, cannot have more than half at the most. It would be directly against the contract, and it would be directly against the law, to say that this creditor may come in and take another man's property to pay Potter's debt. I do not in the least forget that it is in a certain sense a joint debt. There are

the two rents, both of the mortgagors owe a debt, and the property belongs to both of them, in some sense or another. But I cannot resort to that consideration for the purpose of deciding the present question. I must treat these debts as if they were totally and entirely distinct and apart, and every reason which I have been considering why the mortgagees cannot distrain as regards Potter's debts on anything but Potter's estate or chattels, applies also to Ferrige," (the other tenant.) "You can do no more in the one case than the other. The landlord had a right, as I have said, to lay his hands upon and remove everything that was Potter's, that is to say, everything that Potter could remove. But Potter could with no justice remove these bricks. They were partnership property, and he could not take them away; if he did so, he would be doing a wrong thing, for his position as partner would not give him any right so to deal with them. The distress must be limited to chattels which belonged to Potter and Ferrige respectively, and in seizing these bricks I think the mortgagees have exceeded the right of a landlord to distrain the chattels of a tenant in common of the lands in question. He may take everything he can find belonging to the person against whom each warrant is issued. If he can find a brick that belongs to Potter, he may take it, but if he tries to take a brick in which there is any joint ownership, he exceeds his legal right. He must not take anything that belongs to Ferrige, and he cannot take the joint property without taking something that does belong to Ferrige. I come to this conclusion reluctantly, because it is directly against the common sense and justice of the case; but as I feel satisfied it is according to law, I have no option but so to decide."

Applying the reasoning of that case to the present, the lumber and logs, taken in the most favourable view on the evidence for the defendant, were the joint property of the plaintiff and Matthewson. As to the plaintiff, it was privileged from distress for the reasons already stated, and that privilege, it appears to me, is quite as strong as the right of the tenant to have his goods on the land held by him in

common with his co-tenant, to protect his interest though the entire chattel did not belong to him. Woodfall, in his work on Landlord and Tenant, 11th ed., 396, referring to *ex parte* Potter, says: "There would seem to be no right practically to distrain on partnership property."

But this must be taken with the qualification that the interest of one of the partners is for some cause exempt from distress. It seems to me, both on principle and authority, if the saw logs had been taken to the farm of Patterson and Matthewson, without any reference to the trade or business of saw-millers, that they would have been liable to be distrained if solely owned by the plaintiff, who was not liable or responsible for the rent; and the fact that one of the tenants liable for the rent was a part owner would certainly not render them as matter of common sense less liable, and I do not see the legal principle on which they would be privileged.

The pleas of the plaintiff to the defendant's avowry sufficiently present his legal right, and there would seem on the record to be no legal objection on the facts proved to the plaintiff's right to recover on the ground of the non-joinder of Matthewson as a plaintiff. The goods being privileged, trespass or trover would lie against the landlord, who has no better right than a stranger, for seizing or converting the joint property, and if he wishes to set up the non-joinder of the joint owner, he should plead it: *Addison v. Overend*, 6 T. R. 766.

I think therefore the rule should be made absolute to set aside the verdict for the defendant, and to enter it for the plaintiff for \$5 damages, the cost of the replevin bond. The plaintiff is also entitled to a certificate for costs. The law and authorities relating to exemptions from distress for rent will be found very fully considered in the case of *Mitchell v. Coffee*, 5 App. R. 525.

HAGARTY, C. J.—This seems to be a case of first impression, so far as authority is concerned. Treating it as such I think our leaning should be in favour of, rather than against, the principle of exemption.

I think the trade of saw-millers is one of a public nature. There are two tenants. One of these is engaged with another person (the plaintiff) in the business of getting out logs. The plaintiff brings them, in the ordinary course of business, to the mill to be sawed into boards.

I am not prepared to hold that the plaintiff is not entitled to the protection of the rule as to exemptions from distress, merely because one of the tenants has a joint interest with him in the logs.

Lord Blackburn's opinion, that the privilege was rather to the trade than to the ownership of the goods, is supported by other *dicta*. Sir A. Cockburn says; "If the goods deposited were liable to be distrained it would affect the very existence of their business": *Miles v. Furber*, L. R. 8. Q. B. 82.

Archibald, J.: "The principle on which exceptions in the case of certain trades have been engrafted on the general liability of goods to be distrained for rent, when found on the demised premises, appears to be, that the trade or business could not be carried on except the goods were privileged from distress. * * The law of distress, by which one man's goods are made to pay for another man's debts, is not one which should be carried beyond the limits to which it has already been confined,"

The elaborate dissenting judgment of Parke, B., in *Muspratt v. Gregory*, 1 M. & W. 633, on the other hand, seems to rest the privilege solely on the public benefit and convenience.

If five or six persons, as a firm, carried on the business of innkeepers, and a guest brought a horse to the inn, and the landlord distrained him for rent in arrear, it would be a curious result if the exemption were to be destroyed on proof that one of the five tenants was jointly interested with the guest in the horse. Or if one of five tenants of a large smithy or shoeing establishment jointly owned a horse brought by the other joint owner to be shod in the ordinary course of business. Instances may be multiplied to any extent. A perfectly distinct business and trade may

be carried on by the guest or owner of the horse with the one tenant and possibly with others in dealing in horses. Why should not the firm so dealing have the ordinary exemption in such a case allowed in their favour?

The point is new to me. Not without some hesitation, arising chiefly from the absence of direct authority, I concur in holding that this plaintiff has a right to damages for an illegal taking of his property, and that the fact of one of the tenants being jointly interested with him does not necessarily destroy his claim to exemption.

ARMOUR, J., concurred.

Rule absolute.

LAPOINTE V. LAFLEUR.

Ejectment—Reservation of certain quantity of land from conveyance—Time of selection.

Defendant conveyed to his son J. L., jun., the east half of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death, J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., (the defendant,) to J. L., jun."

Held, that the reservation in the deed from the defendant to his son was more properly an exception than a reservation: that an estate for the joint lives of the defendant and his wife, and for the life of the survivor, remained in the defendant; and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son.

Burnham v. Ramsey, 32 U. C. R. 49, distinguished.

The estate in question had been conveyed to G. D. & L. P., between whom a partition had been made, *not under seal*, giving to L. P. the east half. Afterwards G. D. conveyed to the defendant his interest in the east half, and after the execution of the deed by the defendant to his son, L. P. by deed, reciting that by oversight there was no release from him of the east half, and that he was desirous of completing the son's title, released the east half to the son.

It was contended that the defendant owned only an undivided moiety of the lot when he conveyed to his son, and that the plaintiff, claiming through the son, could recover an undivided moiety of the acre selected by the defendant; but *Held*, otherwise, for the plaintiff took his deed subject to the reservation in the defendant's deed to his son, and the deed from L. P. to the son would enure only to the benefit of the title conveyed to him by his father.

EJECTMENT for the east half of lot 16, in the 1st concession, Ottawa front, of the township of Gloucester, except two acres, describing them.

The defence was limited to one acre of the land sought to be recovered, describing it by metes and bounds.

The plaintiff claimed title by deed from the Canada

Permanent Loan and Savings Company; the defendant, by deed from one Dagenais, who claimed under the grantee of the Crown.

The cause was tried, at the last Fall Assizes at Ottawa, by and before the Chief Justice of this Court.

The patent from the Crown was put in, dated October 15th, 1803, granting the whole of lot 16, with other lands, to Henry Munro; also a deed, dated February 7th, 1846, from Henry Munro to George Dagenais and Louis Petit, conveying to them the whole lot 16 (except two acres) in fee. On the back of this last mentioned deed there was endorsed an instrument under the hands of George Dagenais and Louis Petit, bearing date the 29th day of November, 1851, in the following words: "Know all men by these presents, that we, George Dagenais and Louis Petit, having bought jointly from Dr. Munro that lot of land herein described, being lot 16 in the 1st concession of Gloucester, Ottawa front, have now resolved to divide the same agreeably to the understanding we had when we made the purchase. We now declare as follows, viz., George Dagenais gives up all claims to the east half of said lot running along the side line of lot No. 17, from Ottawa, to the second concession of Gloucester, to and in favour of Louis Petit, his heirs and executors; and Louis Petit gives up all claim to the west half of said lot, running along the side line of No. 15 from the Ottawa, to the second concession, to and in favour of George Dagenais, his heirs and executors; and when it becomes necessary to run the line dividing the lot, it is understood to be at the mutual expense of both parties, and the fencing of the said division line is also to be at the mutual expense of both parties."

Deed, dated April 7th, 1855, George Dagenais to the defendant, conveying the east half of lot 16 (except two acres) to the defendant in fee.

Deed, dated 26th September, 1862, and made between and executed by the defendant, Joseph Lafleur, the elder, of the first part, his wife, for the purpose of barring

her dower, of the second part, and Joseph Lafleur, the younger, of the third part, whereby the defendant did grant, bargain, and sell unto Joseph Lafleur, the younger, "his heirs and assigns forever, reserving, however, one acre, as is hereinafter mentioned, all and singular that certain parcel or tract of land and premises, situate, lying, and being in the township of Gloucester aforesaid, and being composed of the east half of lot No. 16, in the 1st concession, Ottawa front, of the said township of Gloucester; reserving, however, from the operation of these presents, unto the said party of the first and second parts during their joint lives and during the life of the survivor of them, one acre of the said half lot hereby conveyed or intended so to be, the said acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit," subject to certain trusts and provisions, unnecessary to be here set out.

There was also a deed, dated the 26th December, 1862, from Louis Petit to Joseph Lafleur, the younger, whereby—after reciting that he and Dagenais were tenants in common of the whole lot No. 16: that in 1855, (should have been 1851) they agreed to divide, and did divide the said lot between them, he taking the west half and Dagenais the east half, but by some oversight no release of his interest in the east half appeared on record: that Joseph Lafleur, the younger, by purchase from his father, Joseph Lafleur, the elder, who purchased from Dagenais, had become proprietor of the east half; and that he was desirous of correcting the oversight and completing the legal title of Joseph Lafleur, the younger, in and to the east half—the said Louis Petit granted and released the said east half to the said Joseph Lafleur, the younger, in fee simple.

Four several mortgages were put in, dated respectively the 11th June, 1869, 26th July, 1871, 17th March, 1874, and 3rd January, 1876, made respectively by Joseph Lafleur, the younger, and his wife, for the purpose of barring her dower, to The Canada Permanent Loan and Savings Company, conveying the east half of lot No. 16, (except

two acres.) Then a deed, dated 12th December, 1878, made under the powers of sale contained in the said mortgages, by the Canada Permanent Loan and Savings Company to the plaintiff, conveying the east half of lot 16 (except two acres,) "subject to the reservations contained in the deed from Joseph Lafleur, the elder, to Joseph Lafleur the younger, dated 26th September, 1862."

The other facts given in evidence at the trial and found by the learned Chief Justice, were shortly these: After the execution of the deed of the 26th September, 1862, the defendant continued to live in the house on the said land with his son Joseph Lafleur, the younger, until the death of his said son, July 5th, 1876. About two or three years before his death, Joseph Lafleur, the younger, built a small house on the land in question, intending, if he rented the house he lived in, to go and live in it with his father, the defendant, but he did not do so, and the house so built was occupied by men in his employment until his death. After his son's death his father, the defendant, went to live with one of his daughters, and continued to live with her until the spring of 1877, when he returned and went to live in the small house on the land in question; the widow of Joseph Lafleur, the younger, having continued to live and then living in the house where her husband had lived. The defendant then improved this small house by putting a stone foundation under it, fixing it up inside, plastering it and building a kitchen to it, and continued to live in it and was living in it when this action was brought.

At the time of the sale by the Canada Permanent Loan and Savings Company to the plaintiff, the defendant was called and asked whether he had ever chosen or selected his acre, when he said not. They asked him where he would take it, and he said he selected where he was residing. This was before the land was put up for sale, and the plaintiff was present and heard all the conversation. The plaintiff bought with the fullest notice of the defendant's right, and that he was living in the house, and he never raised any objection to it nor claimed any rent from him for it until

shortly before this action was brought, during last fall, when some dispute arose about some wheat, when the plaintiff told him he had never asked him for his acre, which he should have done, and not have gone himself and taken it; and the plaintiff then brought this action.

The learned Chief Justice found a verdict for the defendant.

In Michaelmas Term last, (Nov. 16th, 1880,) *Bethune*, Q. C., obtained a rule to set aside the verdict for the defendant, and to enter it for the plaintiff for the whole of the land in question in this cause, or if not then for an undivided half thereof, on the ground that the conveyance by the defendant to Joseph Lafleur, the younger, passed the title to the land in question to Joseph Lafleur, the younger, and did not reconvey the same to the defendant; and on the further ground that the defendant, when he executed the said conveyance to Joseph Lafleur, the younger, was seised only of an undivided moiety of the said land in question; and that the plaintiff, as assignee of Joseph Lafleur, the younger, was entitled to recover the other undivided half of the said land.

Allan Cassels, with him *W. N. Ponton*, shewed cause. The action is one wholly without merits, and justice is all with the defendant. A construction favourable to him will, therefore, be put upon the instruments on which his title depends. Plaintiff is fixed with notice; he accepted the title, and being guilty of laches, cannot now complain. He is estopped from bringing this action: *Joyce v. Rawlins*, L. R. 11 Eq., 53. The deed under which he claims expressly reserves defendant's rights, and the registered and possessory titles are consistent. It is not necessary that a selection should have been made in the lifetime of Joseph Lafleur, jr., for *he* was not to select, but his father and mother were, who are undoubtedly entitled to their acre somewhere in the half-lot. *Burnham v. Ramsey*, 32 U. C. R. 491, is to be distinguished. There, "so much land as should be required," was to be selected, but this is a life-

estate in one acre, a definite limitation. The quit claim deed of Dagenais to Joseph Lafleur, jr., enured to the benefit of the defendant and immediately attached so as to perfect his title as well. Plaintiff should be declared a trustee: *Grace v. McDermott*, 13 Grant 247; *Aberdeen Town Council v. Aberdeen University*, L. R. 2 App. Cases, 544. Where a deed cannot take effect in one way it shall in another, and the trust deed may be construed as granting the acre, to hold the same *in trust* for the grantor and his wife. That the plaintiff and those through whom he claims had notice of this trust is undisputed. The memorial of the trust deed is executed by Joseph Lafleur, jr., thus confirming the trust: *Leith's Real Property Statutes*, 43⁹. The notice of the trust converts the purchaser into trustee. The result of the acts of Dagenais and Petit, followed up by the quit claim deed, was a valid partition of the property between Petit and Dagenais. This is a good reservation. The maxim, *Id certum est quod certum reddi potest*, applies. Had Joseph Lafleur, jr., died the day after the trust deed was executed, defendant would have been able to select, and if then, now also. His defence is a selection: *Hebner v. Williamson*, 44 U. C. R. 593.

There can be no difference between a demise after death and a reservation during life. This is a freehold, not of inheritance carved out of a freehold of inheritance and the remainder granted: no new estate is created. See *Hartman v. Fleming*, 30 U. C. R. 209, where a reservation of a life-estate was construed as a covenant to stand seised. This may be looked on as a valid exception under the authorities cited in *Leith's Blackstone*, last edition, pp. 333, 234, and *Sheppard's Touchstone*, pp. 78, 79, 80, and is not repugnant to the grant. But this is unnecessary, for here, before the operative words operate on the lands described, the reservation is made. Joseph Lafleur, jr., could not have brought ejectment; then the assignee of his interest cannot. Joseph Lafleur, the younger, was a volunteer, and there can be no equity to perfect an imper-

fect gift. In a case in Term, the Court will look at the circumstances of the case, the small value of the subject matter, and the litigious nature of the action. In any event, if necessary, leave should be given to add an equitable plea, praying that the plaintiff be declared a trustee, or that defendant is entitled to a lien for improvements made under a mistake in title: R. S. O. ch. 95, sec. 4; *McCarthy v. Arbuckle*, 31 C. P. pp. 48, 227. As to construction, see *Parkhurst v. Smith, Willes*, 832, and *Sheppard's Touchstone*, p. 253.

Bethune, Q.C., contra. There was no estoppel. The fee in only half the land was in the son at the time he executed the trust deed, and that was all that the father acquired, and therefore the plaintiff is entitled to recover an undivided half of the land. The acre was not a reservation, it was an exception, and was void for uncertainty: *Heath v. Crealock*, L. R. 10 Chy. App. 22.

March 11, 1881. ARMOUR, J.—The plaintiff's principal, if not his only, contention at the trial was, that the defendant not having selected the acre referred to in the deed from him to Joseph Lafleur, the younger, during the lifetime of Joseph Lafleur, the younger, had lost his right of selection, and that he was consequently entitled to recover, and he relied upon *Burnham v. Ramsey*, 32 U. C. R. 491, to support his contention.

"When nothing passes to the feoffee or grantee before election to have one thing or the other, then the election ought to be made in the lifetime of the parties, and the heir or executor cannot make the election." And this was the case in *Burnham v. Ramsey*. "But when an estate or interest passes presently to the feoffee, donee, or grantee, there the election may be made by him, or his heirs or executors." (See *Heywood's Case*, 2 Co. 35; *Bacon's Abridgment*, Title, "Election," C.)

If, therefore, the person who is to elect has the estate or interest, he may elect at any time, or his heirs or executors may elect, and he or they may so elect during the lifetime

or after the death of the person who, but for the election, would be entitled.

In this case the reservation in the deed from the defendant to Joseph Lafleur, the younger, was not, legally speaking, a reservation but an exception; and its legal effect was to except out of the premises granted an estate for the joint lives of the defendant and his wife, and for the life of the survivor, in one acre of the premises, the said acre to be taken in any part of the lands thereby conveyed, where the said defendant and his wife saw fit. This estate so excepted did not pass to Joseph Lafleur, the younger, but remained in the defendant; and having this estate, he was entitled to select the acre at any time; and the death of Joseph Lafleur, the younger, did not in any way affect this right.

But it was contended that the defendant was only entitled to an undivided moiety of the land conveyed by him to Joseph Lafleur, the younger, at the time he so conveyed it; and that, therefore, the plaintiff is entitled to recover an undivided moiety of the acre selected by the defendant: that the instrument endorsed on the deed from Munro to Dagenais and Petit, although a good partition in equity, was not so in law, not being under seal; and that the effect of the deed made by Petit to Joseph Lafleur, the younger, after the deed from the defendant to him, was to vest in him an undivided moiety of the land, purporting to be conveyed by the defendant to him, free from the so called reservation.

Assuming, however, that this was the effect in law, and that Joseph Lafleur, the younger, and the Canada Permanent Loan and Savings Company, would be entitled to the benefit of such effect, it is quite clear that the plaintiff is not entitled to it, because he took the land mentioned in the deed from the Canada Permanent Loan and Savings Company to him, "subject to the reservations contained in the deed from the defendant to Joseph Lafleur, the younger."

The rule will therefore be discharged.

HAGARTY, C. J.—I agree in the result; but in addition to the ground taken by my brother Armour, I think there is another.

By the trust deed of the 26th September, 1862, the father and wife conveyed the whole of the property to the son, excepting the acre in question, to be taken off any part of the land. The son executes the deed, and by it are reserved rights of pasture and firewood, and half of all the crops off the land.

The son, being a party to this deed, agrees thereto; and as to the reservation, on many of the authorities it is considered that it is as a re-grant by him to the grantor: *Douglas v. Lock*, 2 A. & E. 743; *Wickham v. Hawker*, 7 M. & W. 72.

Then, two months afterwards it is discovered that the moiety of Louis Petit had not been legally got in, and he conveyed to the son his interest, reciting that in 1855 he and Dagenais did divide the lot between them, but by mistake Petit's release of the east half did not appear on record; and recites further, that Joseph Lafleur, the son, had purchased from his father the said east half, and Petit wished to correct the oversight and *complete* the legal title of the son to the east half, &c.

I am satisfied that if any question had been raised in the lifetime of all the parties, a Court of Equity would have promptly put the matter right, and if necessary, it could still be done, and it is within the power of this Court even now to prevent any injustice arising from an admitted oversight.

I think we have the right here to hold that the son and those claiming under and through him, cannot take any benefit under that deed of the 26th September, 1862, except on the trusts and conditions therein plainly expressed, one of which was the right to select an acre on any part of the east half. Any conveyance taken by him afterwards to perfect his title, would enure to the benefit thereof.

CAMERON, J., concurred.

Rule discharged.

STEINHOFF V. THE MERCHANTS' BANK.

Note given to bank for collection—Branches of bank how far distinct—Neglect to give notice to endorser—Liability.

The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to and endorsed by T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the endorsement of T. C. a special endorsement to themselves, but the Chatham manager without endorsing the note sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the endorser, who, however, was well known in Detroit. The manager of the Windsor branch endorsed it to the cashier of the First National Bank, their agent there, and sent it him for collection. Payment having been refused upon presentation they handed it to a notary, who duly protested it, but enclosed the notice for T. C., the endorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch, which was duly posted at Windsor, but was never received from the Chatham post office, and T. C., the endorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it in time to rectify the mistake that the notice for T. C. had been addressed to the Windsor agent. The endorser having been sued in Detroit escaped on the ground of want of notice, and, the maker being worthless, the payee sued defendants for neglect with regard to such notice. It appeared that in Detroit it was the custom for the notary to send notices for the endorsers to the bank from which the note was received. It was contended for defendants that the branches were for this purpose distinct: that the notice was properly sent to Windsor, and thence to the Chatham branch, whence the note came; and that but for the neglect of the P. O. the notice would have been duly received at Chatham and sent to the endorser. But

Held, that the defendants were liable: that on sending the note to their Windsor agent they should have given proper information as to the residence of the endorser for the guidance of the notary; and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the endorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done in time.

THE first count of the declaration set forth that the defendants carried on a general banking business, &c., and that the plaintiff, being possessed of a promissory note for \$686.13, made by George Cox, at that time resident at Detroit and well known to the defendants, payable to the order of and duly endorsed by Thomas Cox, and delivered by him to the plaintiff for value, and before its maturity,

being on the 6th of September, the plaintiff, being a customer of the defendants, delivered the said note so endorsed to the defendants for collection, and for the purpose (for reward to the defendants in that behalf) that the same should be duly presented by the defendants for payment at the office of W. D. Morton & Co. at Detroit, where the same was made payable, on the day when it should become payable, and that if George Cox should not then pay, due notice should be given by the defendants to the endorser, Thomas Cox ; averment of presentment and non-payment, &c., and that the defendants accepted the note for the purpose and on the terms aforesaid, averring non-presentment by the defendants, neglect and default, non-payment by the maker, and that the endorser was thereby discharged.

The second count contained similar allegations, with averment that the note was duly presented at maturity, and that the maker did not pay ; breach, that the defendants did not duly notify the endorser, Thomas Cox, who, by the defendants' neglect and default, was wholly discharged and refused to pay : that the maker was worthless, and that the amount of the note was wholly lost.

Pleas :

1. Not guilty.
2. That it was no part of the defendants' duty or custom or business to receive bills or notes for the purpose of notifying drawers or endorsers, as alleged.
3. Denial of the endorsement by Thomas Cox.
4. Denial of the alleged undertaking.
5. Denial of the delivery or acceptance of the note to or by them for the purpose alleged.
6. That the defendants were not holders when the note matured.
7. To the first count : that the note was duly presented.
8. To the second count : denial of the defendants' undertaking to notify.
9. That the endorser was duly notified.

Issue.

The case was tried at Chatham, by Armour, J., without a jury.

It appeared that the defendants had a branch of their bank at Chatham, and a branch or agency at Windsor, opposite Detroit.

The following admissions were made at the trial :—

1. That Thomas Cox was an endorser on the note referred to in the pleadings in this cause.

2. That the plaintiff received the same on the day it bore date at Detroit.

3. That he thereafter delivered it to Robert W. Rogers, then manager of the defendants' branch bank at Chatham, to be sent there for collection.

4. That the said Robert W. Rogers sent the same to the branch bank of the defendants at Windsor.

5. That the agent or manager of the said branch at Windsor endorsed the same, and sent it to the First National Bank of Detroit for the same purpose.

6. That the said Bank presented said note for payment at the place in Detroit where it was made payable, and it was refused payment.

7. That the said First National Bank of Detroit then handed the said note on the day it became due to one A. J. Higham, duly appointed and having authority to present and protest notes and bills in the city of Detroit, for presentment and protest for non-payment, and to give the regular notice to endorsers.

8. That the said notary did present the said note duly and protested the same, and thereafter duly mailed in the public post office at Detroit notice of non-payment and protest, addressed to "R. H. Morton, agent," manager of the defendants at their branch at Windsor, and enclosed therewith a second notice addressed to the said Thomas Cox.

9. That Charles F. Ireland, an officer in the said branch of the said bank at Windsor, in pursuance of his duty, enclosed the said notice (addressed to the said Thomas Cox) in an envelope or letter addressed to the branch bank of the defendants at Chatham, and duly posted the same so addressed in the public post office at Windsor, to be conveyed and delivered in due course at Chatham.

10. That the said envelope or letter or notice was never delivered out of the post office at Chatham to the said bank, or to any person or persons for them.

11. That no other notice till notice of suit in November, 1875, was given to the said Thomas Cox of non-payment of the said note by the defendants, or any one else acting under their orders in the collection of the said note.

12. That after the said note was placed in the hands of the solicitors for collection in Detroit, the said Robert W. Rogers, being advised by the plaintiff, refused to accept from the said Thomas Cox a renewal of the said note, per his letter of the 1st of December, 1875.

13. That in a suit tried at Detroit, on the facts stated above as to the proceedings had in the presentment and protest of the said note, and the mailing and loss of the said notice, a verdict was found for the defendant Thomas Cox therein, on the ground that he had no notice of protest.

14. That the bank officers of the branch at Chatham, who had control of the said note for suit, were not aware that the said Thomas Cox had not been duly notified of non-payment or of any irregularity in notice of protest, till after the said note had been placed in the hands of the said solicitor for suit in Detroit.

It further appeared that the plaintiff had large dealings with the defendants, and that Mr. Rogers was manager for the defendants in September, 1875, at Chatham.

The plaintiff appeared to have left this note with the bank for collection. He was willing, Rogers said, to leave it as collateral to his discounts, and in that way it was charged to him, as it were, he said, to shew title. It was entered in the books on September 6, 1875, "George Cox, promisor; Thomas Cox, endorser; account of J. W. Steinhoff—payable at Detroit; date, September 3; amount, \$686.13; due November 6." In the margin was written, "Sent Detroit solicitors for collection, 17th November, 1875."

The bank usually charged one-eighth per cent. on collec-

tions out of Chatham ; if not collected there would be no charge.

Rogers said : " The promisor was not considered good for the amount : the endorser, as well as I remember, was quite good for the amount : that was my knowledge. It was payable in Detroit, and both men are supposed to be well known."

On the 6th of September, 1875, Rogers wrote to Morton, the bank agent at Windsor, " I enclose * * for collection, George Cox, \$686.13."

On the back of the note appeared :—

" Pay Merchants' Bank of Canada, or order.

" Thomas Cox.

" Pay to the order of

E. Wendell, Esq., Cashier.

For collection on account of the
Merchants Bank
of Canada.

H. S. Morton,
Windsor, Ont.

E. Wendell, Cashier."

Mr. Wendell was cashier of the First National Bank of Detroit, where the note was made, which was dated at Detroit.

Thomas Cox had evidently endorsed in blank, and over his signature was put by the defendants the special printed form to their order.

The Chatham branch did not appear as a party to the note. The Windsor agent endorsed it alone.

On the 7th of September, 1875, Morton, the defendants' agent at Windsor, wrote to Wendell, " I enclose on collection, George Cox, \$686.13."

It appeared that the First National Bank handed this note to Higham, a notary public.

The protest was produced, which stated that on the 6th of November, 1875, at the request of the First National Bank, the notary duly presented the note at the place of payment, the office of W. D. Morton & Co., Detroit : that payment was refused, and that on the same day notices

(setting them forth) were duly mailed, prepaid, in the Detroit post office, after diligent enquiry being made for the residence, &c., of drawers and endorsers.

“ Notice for
Thos. Cox.
H. R. Morton, Agent.”

Directed

“ Both to H. R. Morton, Agent, Windsor, Ontario.”

It was admitted that this notice was duly received by Morton, and also the notice for Rogers, and one of Morton's clerks sent it on by mail to Chatham for Rogers.

Across the notice of dishonour, *addressed to Morton*, was written : “ Notice mailed Chatham office, 8th November, 1875. C. F. I.,” the initials of Ireland, the Windsor clerk of the defendants.

The Chatham office declared that they never received the copy of a notice addressed to Thomas Cox, which the admissions declared was duly mailed to them.

On the 8th of November the protested note was returned by the Detroit bank to the defendants' Windsor agent.

On the 18th of November, 1875, Mr. Rogers sent the note to Douglas & Bowen, their solicitors in Detroit, for collection. On the 20th of December, 1875, the solicitors wrote to Rogers that the endorser was defending on the ground of want of notice, and saying that the notary had sent his notice, as well as the notice to the bank, to Morton at Windsor, and asking, “ Did you forward it to him ; if so, when ? ”

Up to the time of suing the note was held merely for collection for the plaintiff. Rogers said that to enable them to sue in their own name, he asked the plaintiff to consent to its being held by the bank as collateral, and he assented.

The suit was tried in Detroit, and a verdict was entered for the endorser. The solicitors wrote to Rogers, explaining the result, and that Morton should have at once, on receiving notice of dishonour, have notified the endorser Cox. They pointed out that the Chatham branch was not a party to

the note: that it was on behalf of the Merchants' Bank only endorsed by Morton, the Windsor agent: that had Rogers for the Chatham branch endorsed, the notice might then have been sent by the latter to the endorser after receiving notice from Windsor.

Letters from Rogers to the head office in Montreal were put in, setting forth all the facts very fully and clearly. Rogers also wrote on the 21st of March, 1876, to Messrs. Douglas & Bowen, that if the amount of the note were lost the plaintiff would "no doubt look to us for the amount, and that the notice seemed to have been lost between Windsor and Chatham."

It was proved by Mr. Bowen, one of these solicitors, that it was customary in Michigan for the notary to send notices for all endorsers to the bank from which the note was received. He said their duty ended with giving notice to the party who employed them.

Evidence was also given that the maker was worthless, but the endorser solvent.

The learned Judge entered a verdict for the plaintiff for \$889.30.

February 17, 1881. *Irving, Q. C.*, and *Houston* shewed cause. 1. As the note was endorsed to the Merchants' Bank, and not to the Chatham branch, and not endorsed by the bank, the branch was not entitled to notice, nor to send notice. 2. As the Windsor agent was holder and endorser he should have given the notice direct, and not to the Chatham branch. 3. When the Chatham branch received their own notice and the note and protest, they should have sent it on to Thomas Cox. As to the right of the plaintiff, see *Browne v. Commercial Bank of the Midland District*, 10 U. C. R. 129. This case is distinguishable from *Clode v. Bayley*, 12 M. & W. 51, as the endorsement in that case was to the bank, and here to the branch: See *Prince v. Oriental Bank*, L. R. 3 App. Ca. at p. 332; and at all events, the Chatham branch should have notified the bank in Detroit of the residence of Thomas Cox, and that would have saved all the trouble.

Robinson, Q. C., and Atkinson, contra. If one bank sends to another, and the second make default, the first is not liable; and if the notary neglect, neither bank is liable. The question here is how far the branches of the defendants' bank are to be considered distinct; and on the authority of *Clode v. Bayley*, the notice was rightly sent by post to the Chatham branch, from whence it came, and the fault was that of the post office in not forwarding it to Chatham, which prevented its being given by that branch as it would have been, and the defendants are not liable. See *Story* on Promissory Notes, 7th ed. 428; *Prince v. Oriental Bank*, already cited; *Shearman & Redfield*, 3rd ed., 437; *Ex parte Waring*, 36 L. J. Chy. 151; *Chalmers* on Bills, 144, 146.

March 11, 1881. HAGARTY, C. J.—It would appear from the admissions that Ireland did on the 8th of November send on the notice addressed to Cox to Chatham, by mail, but that the branch at Chatham did not receive it from the office.

It is not stated in terms that this was through any default or neglect of the post office, but we are asked to infer that it was so. It is urged that if this notice had been received in Chatham, say on the 9th of November, a notice in good time could have been that day mailed to the endorser in Detroit.

It is clear the note and protest were received by the bank in Chatham on Wednesday, the 10th of November. The Chatham bank would then have full notice from the protest that the notice to the endorser had been erroneously addressed to Windsor.

It was argued for the defendants that notice from Chatham could have been legally given to Cox in Detroit that day.

We are not told at what hour on the 10th of November the protest reached Chatham. As it was certainly sent from Windsor the day before, the distance by rail being about seventy miles, and several trains each day, it is probable it arrived in the morning and was then received.

The letter from Windsor, enclosing the note and protest, dated 9th of November, is marked on the back: "Date 9th November; received 10th November; answered 10th November," and the protest itself has the Chatham bank stamp on it, with the date of 10th of November.

If so, there would not have been any great difficulty in having a notice of dishonour from the Chatham branch served on the endorser in Detroit, a journey of not many hours. This is assuming the defendants' theory of notice to be correct, and that they had full knowledge from the protest of the erroneous address.

The admissions declare (14th) that the bank officers at Chatham, who had control of the note for suit, were not aware that the endorser had not been duly notified, or of any irregularity in notice, till after the note had been placed in suit.

This is in effect an admission that they neglected to avail themselves of the information plainly contained in the protest received on the 10th of November.

It seems clear from the letters of Mr. Rogers that it was not on any mistake or default of the post office that the defendants excused the omission. He said: "The fault of letting the name of Thomas Cox off the paper rests entirely with the First National Bank of Detroit (our agents), or rather with their solicitor, as Thomas Cox has lived for years in Detroit and was well known. * * Morton & Co. could have told the notary that Thomas Cox lived in Detroit."

We can safely deduce from the evidence:—

1. That the bank did take this note from the plaintiff for collection in the usual way for him, on good consideration, undertaking the duty of presentment and notice to the endorser.

2. That the bank was fully aware that maker and endorser both lived in Detroit.

3. That the Chatham branch sent it to the Windsor branch for such purpose, but neglected to inform them of the endorser's place of residence.

4. That in consequence of such neglect the agents in Detroit did not, on the dishonour of the note, send a properly addressed notice to the endorser, who was thereby discharged, and the debt was thereby lost to the plaintiff.

It is to be observed that the plaintiff left it to the defendants to select the mode in which they might perform their contract with him.

It was wholly by their own choice that the note was sent not directly to the Detroit Bank, their agents, as they admit them to be, but to their Windsor agency. The latter had no information, but were left to use their own judgment.

Windsor bears to Detroit about the same relation that Yorkville does to Toronto, and the Windsor agents could, if they pleased, have easily presented the note at the place of payment and notified the endorser, had proper information been given to them from Chatham.

I do not think it is open to the defendants now to urge that they are excused from liability to the plaintiff, who through their means has undoubtedly lost his claim on the note, because it is alleged that the notice to the endorser was lost in the post office, and if it had arrived in time they could have given a sufficient notice.

Admitting, for the argument, that the Chatham branch, had the notice not been mislaid, could have sent legal notice to Cox, we must remember that the alleged mislaying of the notice only becomes important in consequence of the previous neglect and default of the defendants, which caused that notice to be in a place or position to be lost.

To excuse themselves by the default of the post office, I think they ought to be in a position to say that but for such default the duty entrusted to them had been properly and regularly performed.

It can hardly be pretended that they contemplated that the notice of dishonour intended for the endorser in Detroit was to be first sent to the Windsor branch as the last endorsers, then on to Chatham, and by the latter branch, as the next preceding endorsers or holders, sent in due course to Cox, the first endorser, in Detroit.

The whole difficulty and trouble arose from their neglect of duty in the first instance.

I infer from the evidence, as a conclusion of fact, that if notice sent from the Chatham branch would have been good if given to the endorser on Wednesday, the 10th, the bank could, on discovery, (as they could and ought to have discovered) from the protest, of the blunder that had been made, by a not unreasonable exertion, have caused notice to be given to the endorser in Detroit on that day.

If this view of the law now pressed by Mr. Robinson, be sound, they still had, on the 10th, the means of correcting their former mistake.

To say nothing of the assistance of the telegraph, there would be no physical difficulty that could not have been overcome by a little exertion.

They first neglect to give proper information as to the endorser, and they again neglect to act on the information given them by the protest.

The case of *Clode v. Bayley*, 12 M. & W. 51, seems to favour the contention that the Chatham branch had twenty-four hours after receipt of notice from the Windsor branch to notify their endorser, although the former branch had not endorsed the note. The case is very fully reported, and the facts are peculiar. *Byles on Bills*, 25; *Gladwell v. Turner*, L. R. 5 Ex. 60.

I think the plaintiff has proved satisfactorily a good cause of action against defendants, and that he should hold his verdict.

ARMOUR and CAMERON, JJ., concurred.

Rule discharged.

FLEURY V. COPLAND ET AL.

Sale of goods "to arrive"—Construction of.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods, except perhaps where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner.

In this case, being a sale of iron to be made in Scotland, it was held, upon the evidence set out below, that the sale was absolute, and not subject to any condition as to arrival of the goods.

THE first count of the declaration alleged an agreement that the defendants were to sell to the plaintiff, and the plaintiff to buy from the defendants, eighty tons of No. 1 Summerlee iron, at \$16.75 per ton, to be delivered by the defendants to the plaintiff at the Northern Railway wharf, in the city of Toronto, forty tons thereof on or before the 20th of September, 1879, and forty tons thereof on or before the 20th of October, 1879, payment to be made therefor by the plaintiff by his promissory note at six months, or by note within thirty days from delivery, less four per cent. discount, at the option of the plaintiff: averment of performance of conditions precedent, and that although the defendants delivered a part, they failed to deliver the residue.

There were also the common counts.

Pleas: 1. To first count: did not agree as alleged. 2. To the first count: performance of agreement. 3. To the first count: that the plaintiff was not ready and willing to accept the iron according to the terms of the contract. 4. To first count: waiver before breach. First plea to common counts: never indebted. Second plea to common counts: payment.

Issue.

Suggestion entered on October 2nd, 1880, of the death of Joseph Fleury on September 23rd, 1880, and that Herbert Watson Fleury, Sarah W. Fleury, and Andrew Yule were his executors.

The cause was tried by and before Osler, J., without a

jury, at the last Winter Assizes at Toronto, when the following correspondence was put in and admitted.

Letter, dated June 30th, 1879, Fleury to defendants :

"What can you lay me down eighty tons No. 1 Summerlee iron, and eighty tons No. 1, Eglinton, on the Northern Railway Wharf in Toronto for, one-half of each delivered 20th of September, balance on 20th of October, six months, or four off, payable in Toronto?"

Letter, dated July 2nd, 1879, defendants to Fleury :

"In answer to yours of the 30th ult., we quote for eighty tons No. 1 Summerlee, \$16.75 per ton, and for eighty tons No. 1 Eglinton, \$16.25 per ton, on Northern Railroad Wharf in Toronto, half of each delivered about the 20th of September, and balance about the 20th of October next. Settlement by note at six months, payable in Toronto, or four per cent. off for prompt cash. Immediate reply."

Letter, dated July 12th, 1879, Fleury to defendants :

"I will take eighty tons No. 1 Summerlee, as per your offer of the 4th inst., to be delivered on the Northern Railroad Wharf in Toronto, say one-half not later than the 20th of September, balance by 20th of October; six months from above dates, or four per cent. off for cash within thirty days. Your early reply will much oblige. The balance of order I defer for the present."

Post card, dated 15th of July, 1879, defendants to Fleury :

"Yours of 12th to hand, and in reply would say Mr. McLaren is now west, and will call on you."

Letter, dated 29th of September, 1879, defendants to Fleury :

"We have been disappointed about 150 tons Summerlee pig iron we had ordered, but which missed shipment. This iron was for you and some others with whom we had made contracts. We now write to know if you could do with any less than you wanted, or if you would take Cambrae in place of Summerlee, which we could deliver sooner, or if not, how long you could wait conveniently on the Summerlee. Please reply first mail."

Letter, dated October 1st, 1879, Fleury to defendants :

"In reply to yours of the 29th inst., beg to say I want

the Summerlee, else I should have bought the other brands, which I could have done at a less price. I am waiting now to fill our moulding shop with men on the iron arriving, and hope you will get it through in course of two or three weeks, or sooner, if possible."

Letter, dated October 23, 1879, Fleury to defendants :

"I am much in need of the iron. Will you be kind enough to send it on as soon as possible ; if not at once, let me know when we may expect it for certain."

Post card, dated November 1, 1879, Defendants to Fleury :

"In answer to your P. C., would say the iron sold 'to arrive,' has not turned up, and we regret this exceedingly. We have waited, hoping to give you some word about it."

Letter, dated November 23, 1879, Fleury to defendants :

"I am suffering a serious loss for want of the Summerlee pig iron which we have been waiting on you for so long. Will you kindly send it on at once, or so much of it as will keep us going until you can send the whole. Your early reply will oblige us. I shall have to purchase if not to hand shortly."

Letter, dated November 27, 1879, Defendants to Fleury :

"We have had no iron arriving since the date of your order. Our agent unfortunately misunderstood our instructions, and then was afraid to buy when the market and freight both went up so much, and so we were left without iron altogether. We have, however, ordered some out to Toronto to fill engagements, or rather partly fill them, in the meantime. It will be a very heavy loss to us, and we trust you will meet us as far as possible by doing with as much less as you possibly can. We expect the iron will be shipped in the early part of December, without fail."

Letter, dated January 2, 1880, Defendants to Fleury :

"We wrote you on 27th November, but have no reply. As we have now some pig iron on the way to Toronto from Portland, would be glad to hear from you at once as to quantity. The balance of this lot will be about fifty or sixty tons, and we trust you can meet us by accepting this for your lot bought 'to arrive.' The iron may reach Toronto any day now."

Letter, dated January 6, 1880, Fleury to defendants :

"In reply to yours of the 2nd inst., would say in yours of November you stated that the iron would be here in January. I therefore thought it unnecessary for me to write, and therefore have been just doing the best we could for want of it, and hope it will come to hand at a very early date. I also trust you will send the amount ordered."

Telegram, dated January 8, 1880, Defendants to Fleury :

"Letter received. Wire immediately if you insist on eighty tons sold to arrive September and October."

Telegram, dated January 8, 1880, Fleury to defendants :

"Send on the eighty tons."

Telegram, dated January 8, 1880, Defendants to Fleury :

"Please wire definite answer. Trying to save you inconvenience at heavy loss."

Telegram, dated January 8, 1880, Fleury to defendants :

"I certainly think you should furnish it all."

Letter, dated January 8, 1880, Defendants to Fleury :

"Yours of 6th to hand, and note contents. We notice you do not take into consideration at all that your iron did not arrive, and your telegrams would indicate the same idea. We are advised against shipping any on the verbal arrangement made; but taking into account your convenience and fostering future trade, we are anxious to meet you as far as we can. We have not eighty tons to send. On receipt you can wire us your final answer, as you evidently view the thing differently to parties here."

Letter, dated January 17, 1880, Defendants to Fleury :

"We have no reply to our letter, but having the balance of Summerlee at Toronto, have sent it on, and now enclose account. We presume, if you have taken any advice on the matter, that we are not saving ourselves at your expense, as we might. We will be glad to receive note signed per return."

Letter, dated January 27, 1880, Fleury to defendants :

"The iron invoiced by you on 10th inst. has arrived. We had it weighed on the weigh scales here and found it short 1,314 pounds. The scales here shew 133,226 pounds. How can this be accounted for? I would like the balance of the order as soon as convenient."

Letter, dated January 29, 1880, Defendants to Fleury :

"We have your favour of 27th inst. The iron was weighed at Toronto by Charles McDonald, and he is satisfied of its correctness. Other lots weighed about the same time were all right. You must remember delivery was made at Toronto, not at your station, and the loss may have occurred in various ways after delivery. We have no more Summerlee iron to send you. What we supplied was at a heavy loss to ourselves, the lot we sold you from having never arrived. Kindly send us your note in settlement per return mail."

Letter, dated February 2, 1880, Fleury to defendants :

"I am prepared to send you either note or cash for iron, but want to know what you are going to do about the other twenty or twenty-five tons. I don't propose buying it at the advanced price, when, if you had not agreed to furnish it, we would have bought from other parties. I am anxious to have the account settled, but not at a loss of \$8 or \$10 per ton on the balance. If you wish, you can have pay for what we got, providing you satisfy us that you will furnish the balance at same price."

Letter, dated February 4, 1880, Defendants to Fleury :

"In answer to yours of the 2nd, we regret you take the position you do in spite of our supplying you with iron against advice received. We may say, however, that had we not intended to supply the whole of your iron we would not have given any. Had we been inclined to act suspiciously, we might have demanded settlement on delivery at Toronto. We have some Gartsherrie No. 1 on way out now, and we presume, in any case, you are not in immediate want. We should think there will be no further difficulty about your sending settlement."

Letter, dated February 7, 1880, Fleury to defendants :

"Yours of the 4th inst. to hand, and in reply beg to say I am prepared to pay you for the iron received, but want to know whether you are going to give me the balance of twenty tons or not. You say you have no more. Now, to get over that trouble, would say I will take Nova Scotia iron at same price I bought it for, at same terms I bought from you. viz., No. 3, \$17.00, No. 2, \$17.50, on car at Toronto, six months. I don't know what fairer offer you can ask. You surely don't expect to back out because iron

went up. If it had gone down, as it did the year before, after I had bought, I presume you would not allow me the reduction. I have no use for Gartsherrie."

Letter, dated February 10, 1880, Defendants to Fleury :

"We repeat what we have already said, that we will give you balance of your iron, and we can scarcely think you wish to entail further loss on us by holding our money that is certainly earned. We have already explained to you that we were led into a loss by the iron not arriving as ordered, and we can only say further, had the loss been yours by a mistake, we would have met you in a different way. The Gartsherrie iron we have coming is equal in quality to Summerlee, and usually sells higher, so that we cannot make out your objection to it. We may be able to exchange at some further expense of cartage, &c. We have no Nova Scotia iron, and are told the agents won't agree to deliver for some time to come. Your letter of 7th is only here this a.m., so correspondence is slow."

Letter, dated February 14, 1880, Fleury to defendants :

"Enclosed find draft for eight hundred (say \$800) dollars. Will settle balance with the other iron when it comes. In reference to Gartsherrie iron, would say, while I know it is an iron which sells as high or higher than Summerlee, yet it is not so good for the purpose I want it as Summerlee. Hope you will send on the balance at an early date."

Post card, dated February 17, 1880, Defendants to Fleury :

"Yours of 14th to hand, and we place eight hundred dollars to your credit, with thanks. Of course we would gladly give you Summerlee if we had it on hand, but having the Gartsherrie now, we could square the matter up, and the proportion is very small. Other agricultural works take it readily, and one that we supply will have nothing else than Gartsherrie."

Letter, dated April 16, 1880, Fleury to defendants :

"Having waited for the balance of the pig iron until it was necessary to have it, I have bought twenty tons to take the place of the twenty tons which I was to get from you. I therefore wish you to relieve me of the balance of order and send me a receipt in full for what I have had,

having had to pay a difference of more than I kept back from you."

Post card, dated May 5, 1880, Defendants to Fleury :

" Please inform us per return if you desire to cancel the balance of your order for pig iron not yet filled. We wrote you 20th April and 1st May to the above effect, but letters have gone amissing."

Post card, dated May 7, 1880, Fleury to defendants :

" In reply to your post card of 5th inst., I beg to say my letter to you of 16th April last will give you all the information you ask for. You will be kind enough to reply to it."

Letter, dated May 10, 1880, Defendants to Fleury :

" Your post card of 7th May to hand, and it appears quite clear to us that you are trying to make the most money out of our misfortune possible. To close the transaction with you, we will send the balance of your iron to the Northern Railway wharf to your order, and you will please instruct the agent there as to its disposal."

Letter, dated May 12, 1880, Fleury to defendants :

" Yours of 10th to hand, and I am suprised to hear men whom I supposed were considered business men whining and squirming because goods went up after they sold. I suppose if you had sold three months ago, to be delivered now, when it had come down \$10 per ton, we would not hear you whine. Now, in reference to the balance of my order, I wrote you several times, asking you whether you were going to furnish it, but you refused or did not do so. I bought that much at \$27 per ton. Now, if you pay for that, or allow me on the account, I will deal with you for more, but at present don't want to buy, and if you send any to the Northern Railroad, or to any one else for me, you had better arrange for disposal before doing so. I have no desire, as you say, to make money out of the rise or fall of goods in that I deal, and trust you will take the same view of it, else there may be unpleasantness, which I assure you I don't desire."

Letter, dated May 27, 1880, Defendants to Fleury :

" Yours of 12th inst. duly received, but press of business hindered us replying. You apparently forget that we

delivered you iron which legally you could not have got from us, and that since your last letter, asking us to deliver balance as early as possible, you have not informed us that you must buy unless we supplied, which was clearly a business man's duty. As long as iron was rising you insisted that you must have every pound, but as soon as we are likely to save ourselves a little, you inform us that you have swallowed up the balance kept back, and it looks very much as if, had iron fallen instead of rising last fall, you would have cancelled the whole lot as you do this twenty tons. We are advised that your position is quite untenable ; but to square the matter without further unpleasantness, we are willing to supply the balance or refer the matter. Say which you desire per return."

Evidence was then given on the part of the plaintiff to shew the price of No. 1 Summerlee pig iron in September and October, 1879, and on the 5th of April, 1880, the day on which Fleury purchased the twenty tons to replace the balance the defendants had failed to deliver. It appeared also that Fleury was a manufacturer of agricultural implements, having his place of business at Aurora, in the county of York, Ontario, and that the defendants were merchants carrying on business in Montreal, and had a house in Glasgow.

For the defence, Henry McLaren was the only witness, and his evidence was as follows :

" Q.—On what conditions was this iron sold to Fleury ?
A.—Sold to arrive. Q.—Did it arrive ? A.—It did not.
Q.—Where was the contract completed ? A.—On a car on the Northern Railway, in an interview between Mr. Fleury and myself. Q.—That is, subsequent to a card from your firm informing Mr. Fleury that you were up west and would call upon him ? A.—Ten days after. In pursuance of that card I called at his office in Aurora. I called at Mr. Fleury's office on the morning of that day, and found he was absent. It was on the 25th of July he was not at home. I then went up to Barrie, and I met him afterwards coming down on the train : then we discussed the terms and settled the contract. Q.—Were the terms of the contract as to payment varied in that conversation ? A.—They were different from the terms mentioned in Mr. Fleury's letter. Q.—And were the terms then subsequently

carried out? A.—They were subsequently carried out. The terms were, that the goods were to be paid for either by six months' note or cash promptly on arrival, and that the freight was to be paid in cash without deduction of interest, four per cent. for discount if paid promptly on arrival at Toronto. We objected to the thirty days that Mr. Fleury claimed for payment. The freight was to be paid by Mr. Fleury and deducted from the account, without deducting interest on the freight.

“*Cross-examined*—Q.—You said to Mr. Rose that it was sold to arrive? A.—Yes, sir. Q.—When did that first occur to you, ‘sold to arrive?’ A.—We all sell iron on that basis. Q.—You never make an absolute contract for the sale of iron? A.—Unless we have the goods on hand. Q.—You were examined in this suit before a commissioner at Montreal? A.—I was. Q.—How does it come that in that examination you made no representation about this. I will read what you said on that examination. I want to know from you now if what you stated there was correct. When you were asked if there was any variation of the letters of the 30th of June and the 2nd of July, 1879, made on the car, your answer was, ‘There was. The principal variation was that Mr. Fleury agreed to pay the freight on the iron to Toronto in cash, without deduction of interest; neither did he want any Eglinton, which we had offered in our letter in conjunction with the Summerlee, thereby virtually re-opening the whole matter. We had also a special dispute over the discount for cash within thirty days, mentioned in the copy of letter No. 3, dated 12th of July, 1879, the result of which was that Mr. Fleury said he would either give us a six months' note in settlement or pay in cash promptly on delivery being made at Toronto. The time for delivery was not specially stipulated. That is all the variations that were made in the terms of the letter No. 3.’ Now, is that correct, or is it not? A.—That is all the variation there made in the terms of the letter No. 3. Q.—That was true, was it not? That was the order, was it not? Wasn't letter No. 3 the order; the order to you wasn't it? A.—What is the order? Q.—‘I will take eighty tons Summerlee, as per your offer of the 4th instant.’ The variations you have mentioned are the only variations in the letter. Is that correct or not? A.—That is correct. There is also the original arrangement, that the iron was to be imported for Mr. Fleury. Q.—You say what you stated upon this

examination was correct? A.—It is correct. Q.—Then you say, in this part I have referred to, nothing was said about the time of delivery, ‘I did not mention any date.’ A.—That is correct as to delivery. There was also this further, ‘I can supplement that by this,’ which also proves the arrival business. I asked Mr. Fleury if he could take it earlier, or whether he insisted upon its coming on at that time. He said, ‘You can send it along any time it arrives.’ These are the precise words of Mr. Fleury, ‘You can send it along any time it arrives—any time it suits you.’ Q.—You asked if you could deliver it earlier than those times appointed? A.—Yes, because I thought our iron might arrive earlier. This was on the 25th of July, and the iron might arrive before the end of August. Q.—On February 14th you say, ‘In answer to yours of the 2nd,’ you did intend to deliver the whole of the iron? A.—We did, and we tendered it all. Q.—But you tendered it all some time in May after the purchase was made? A.—I believe it was. At the same time Mr. Fleury never notified us he must buy. Q.—That was the only objection you made in the letter of the 27th of May; that is the only objection you had in the letter, he had not notified you he must buy elsewhere? A.—The letter speaks for itself. Q.—And in this letter that you wrote on the 5th of May, ‘If you desire to cancel your order for the balance of your order not yet filled?’ A.—We had iron then arriving. Q.—You had one notice from Fleury that he must purchase elsewhere; the letter of the 23rd of November, 1879, ‘I will have to purchase unless you furnish shortly.’ A.—We supplied a lot of iron subsequent to that.

“*Re-examination.*—Q.—Where was the iron to be from? A.—From Scotland. Q.—Did you indicate that fact to Fleury? A.—I did. Q.—Was it explicitly understood between you it was ‘sold to arrive.’ A.—There can be no question about that. We are doing business in Montreal. We have a house in Glasgow.”

The learned Judge reserved his decision, and on a subsequent day gave a written judgment, in which, after setting out the correspondence, he proceeded as follows:—

“The defendant McLaren was called as a witness, but his evidence was not corroborated, and therefore, as the plaintiffs are the executors of Fleury, was not admissible: *Chesley v. Murdock*, 2 S. C. 48. It appeared that the price paid for the sixty tons which had been delivered was

\$16.75. It appears to me that a contract is made out from the correspondence for the sale of eighty tons of Summerlee iron at \$16.75 per ton, deliverable in September and October at the Northern Railroad wharf, Toronto. The defendant contends that it was only a sale of iron 'to arrive,' and that as it never arrived they were not bound to deliver. Nothing of that kind appears from the quotations or earlier letters, nor is it anywhere by the plaintiff admitted to be the case, and the defendants' letters of the 4th and 10th of February are not consistent with it. The measure of damages is governed by the October market prices, which were the same as those of April, when the plaintiff purchased the twenty tons in lieu of those not delivered by the defendants :

" Twenty tons at \$16.75	\$335 00
" " " 27.00	540 00

" Verdict for plaintiff \$205 00

February 10, 1881. *Rose* obtained a rule *nisi* to set aside the verdict and enter a nonsuit or verdict for the defendants, pursuant to the Common Law Procedure Act, on the law, evidence, and weight of evidence ; or to reduce the verdict to \$107.50, or such other sum as to the Court might seem right.

February 16, 1881. *G. H. Watson* shewed cause. The whole correspondence shews the part performance of the contract by the defendants in terms of the original offer by the late Mr. Fleury, and the intention to perform the balance of the contract. Although there is not an express acceptance of the offer in writing, the part performance of the contract under the terms of the offer is a conclusive acceptance of the offer to that extent, and affords a strong presumption of the acceptance of the offer for the whole of the iron as made. That is strengthened and made almost conclusive by the correspondence which, it is to be remarked, occurred altogether after the breach in delivery by the defendants. Attention is particularly directed to the letters of the 29th of September, 27th of November, 4th of February, 1880, and the five letters written by the defendants subsequent to that, from all of which only one

inference can be drawn, namely, the existence of a contract and the intention on their part to perform it. It is not necessary there should be an acceptance in writing in the construction of a contract by letters: *Bruce v. Tolton*, 4 App. R. 144. Apart from the correspondence, there is no evidence on the part of the defendants upon which a verdict could be given for them. The evidence of the defendant McLaren is wholly uncorroborated; and not only that, but it involves a contradiction, as the evidence given by him before the commissioner at Montreal, which is before the Court, differs from that given by the witness at the trial on the one material point—the terms of the contract. See also *McKinnon v. McDonald*, 26 Grant 12; *Chesley v. Murdoch*, 2 S. C. 48. The damages are rightly assessed, as shewn by the authority of *Ogle v. Earl of Vane*, L. R. 2 Q. B. 275, which is directly in point.

J. E. Rose, contra. The onus is upon the plaintiff to make out a contract, and in that the plaintiff wholly fails. The defendants sold the iron upon the condition of its arrival. All the letters written by the defendants make reference to that condition, and it is not denied in any of the letters written by the plaintiff. The performance of part, as made by the defendants, was quite voluntary on their part, and the fact of such a performance cannot operate as an estoppel against the defendants, or make a contract that never existed. The defendants were anxious to foster future trade, and for that reason expressed an intention, if possible, to furnish the balance of iron. The letters shew that the contract was to be completed by an interview between Mr. Fleury and one of the defendants. It is shewn by evidence that the interview took place, and that the contract was then completed, and Mr. McLaren states that the arrival of the iron was then assented to as one of the conditions of the sale, and that is not, and cannot be, contradicted. The plaintiff wholly fails to make out any other contract than that sworn to by the defendant, and which the correspondence corroborates.

March 11, 1881. ARMOUR, J.—The contest in this case is, as to whether the contract made by the defendants with Mr. Fleury was an absolute one, as insisted upon by the plaintiffs, or a conditional one, as asserted by the defendants.

The defendants say that the iron was “sold to arrive:” that its arrival was therefore a condition precedent to their being called upon to perform their contract: that it never did arrive, and they are therefore excused from performing their contract.

In considering the question presented for our disposal, I shall pursue the course, one which cannot well be complained of by the defendants, of treating the evidence of the defendant McLaren, although uncorroborated, as part of the evidence from which I shall draw my conclusions of fact.

Was it a part of the contract, made with Mr. Fleury on the car on the Northern Railway, for that is where the contract is stated by the defendant McLaren to have been finally closed, that the iron was “sold to arrive,” and that the contract was conditional upon its arriving, and that if it did not arrive the contract was to be void?

A condition such as this would be a very unusual one for a man resident where Mr. Fleury resided, and carrying on the business he was carrying on, to agree to, and probability would be against his agreeing to such a condition, and that he did so agree is only supported by the evidence of the defendant McLaren, and that evidence is extremely meagre and very unsatisfactory, and is opposed to all the surrounding circumstances.

This witness appears to have been handled very tenderly by his counsel, who began by asking him on what conditions the iron was sold, to which he answered “sold to arrive.” He then asked him “Did it arrive?” to which he answered “It did not.” In re-examination he asked him “Where was the iron to be from?” He answered “From Scotland.” “Did you indicate that fact to Fleury?” He answered, “I did.” He then asked him, “Was it explicitly understood between you it was ‘sold to arrive?’”

to which he answered, "There can be no question about that." And this is all the witness's counsel thought fit to ask the witness on the subject of this condition.

He did not ask him when this condition was mentioned to Fleury; whether it was on the car? what was said about it? was it discussed? and above all, what did it mean? and what did Fleury understand it to mean?

"Sold to arrive" in mercantile phrase means sold to arrive by a particular ship which is named in the contract; but the witness stopped short of shewing that this iron was to arrive by a particular ship, and it is unlikely it was to arrive by any one ship, for it was deliverable half in September and half in October; and when his counsel proceeded to ask him in what respects the contract was varied by what took place on the cars from the offer made by Mr. Fleury in his letter of July 12th, he stated the variations that were there and then made, but did not state "sold to arrive" to have been one of them. And when he came to be cross-examined the following questions put to him and answers thereto, made by him before a commissioner at Montreal, were read to him; "Q.—Was there any variation of the letters of 30th of June and 2nd of July, 1879, made on the car? A.—There was. The principal variation was that Mr. Fleury agreed to pay the freight on the iron to Toronto in cash, without deduction of interest; neither did he want any Eglinton, which we had offered in our letter in conjunction with the Summerlee, thereby virtually re-opening the whole matter. We had also a special dispute over the discount for cash within thirty days mentioned in the copy of letter No. 3, dated 12th of July, 1879, the result of which was that Mr. Fleury said he would either give us a six months note in settlement or pay cash promptly on delivery being made at Toronto. The time for delivery was not specially stipulated. That is all the variations that were made in the terms of letter No. 3." And he was asked was that correct or not. He answered, "That is all the variation there made in the terms of letter No. 3." He was then asked: "Q.—I will

take eighty tons Summerlee as per your offer of the 4th instant. The variations you have mentioned are the only variations in the letter. Is that correct or not? A.—That is correct. *There is also the original arrangement that the iron was to be imported for Mr. Fleury.*"

It appears to me, therefore, to be plain from this evidence that the condition "sold to arrive" was not agreed to by Mr. Fleury at the interview on the car, and formed no part of the contract then and there made, and I venture to think it was never even mentioned at that interview. The witness said it was "the original arrangement that the iron was to be imported for Mr. Fleury." When was "the original arrangement" made? It was certainly not made on the car, and it does not appear in any of the previous correspondence. No doubt Mr. Fleury knew that Summerlee iron was made in Scotland, and that in order to be delivered to him it would have to be imported, if it was not already imported; and doubtless when the witness was swearing that the iron was "sold to arrive," all he meant by it was that Mr. Fleury knew it had to be imported; but this is a very different thing from "sold to arrive" in mercantile phrase, and by no means imports the condition into the contract that if the vendors do not choose to import the contract is void.

The conclusions I draw from the evidence of the defendant McLaren are, that the contract made between Fleury and the defendants was an absolute one, and not conditional: that "sold to arrive" was not a condition of the contract at all: that if the iron was "sold to arrive," the meaning to be ascribed to that term in this case, if meaning it has, is the meaning it is shewn to have had according to the defendant McLaren's evidence, "that it was to be imported for Mr. Fleury," and this would not create a condition that in case the defendants failed to import it the contract should be void.

There is much in the correspondence to shew that the sale was an absolute one, and not conditional, and that the rapid rise in the price of iron gave birth to the "sold to arrive" excuse for non-delivery.

The defendants were carrying on business in Glasgow as well as in Montreal, and it would be strange indeed if the plaintiffs should be obliged to put up with a loss inflicted upon their testator by the default of the defendants, whether happening in Glasgow or Montreal.

The damages were, I think, correctly estimated.

The rule will therefore be discharged.

HAGARTY, C. J.—The evidence fails wholly, in my opinion, to offer any corroboration of Mr. McLaren's statement that he sold the iron to the deceased "to arrive," in the sense that the bargain was wholly contingent on its arrival; or in the very large sense in which Mr. Rose construed it, that its performance or non-performance was wholly optional with the vendor, and that if he found it would be against his interest he need not attempt to perform it.

I am slow to believe that any intelligent man engaged in business, and requiring an article for use in his trade, would have entered into such a wholly one-sided bargain.

We can fully understand the bargains "to arrive" set out in the cases cited. The goods always appear to be either in transit on a named vessel or as about being shipped at a named port in some particular manner. Parties may, of course, make any bargain they please. But we are asked here to believe that the deceased agreed in effect with the defendants that if they should be pleased to deliver to him certain iron at a named price and time, he would accept and pay for it.

The correspondence between the parties, down to some months after the bargain, contains no reference to such a conditional bargain, and even afterwards the defendants do not give us the impression that they felt they had only made a contract performable at their own option.

In the present facility of communication with Scotland, it was always in their power to have this Summerlee iron shipped for this market.

I think, under all the circumstances, we should not

accept this version of the contract; and even if there were no legal objection to the reception of Mr. McLaren's evidence, as being uncorroborated, our conclusion should be the same.

CAMERON, J., concurred.

Rule discharged.

INGRAM V. TAYLOR.

Married woman—Right to crops on land owned by her—Separate occupation
—R. S. O. ch. 125.

The plaintiff, a married woman, who had been married in 1864, lived on a 200 acre lot with her husband and children. The land had belonged to her husband's father, who died in 1874, having devised the east half to the plaintiff's son, a minor, and the west half to the plaintiff, there being then a judgment against the husband, which it was supposed was the testator's reason for such devise. The whole farm had been occupied and farmed together, the plaintiff being under the impression that she was entitled to the son's half until he came of age. The husband did some little work about the place, but it was generally known and understood by those who worked upon the farm, as well as by the public, that the place was hers and how it had been left to her. The crops having been seized under an execution issued upon the judgment above mentioned, *Held*, on an interpleader issue:

1. That the wife was not carrying on any occupation or trade separate from her husband, nor were these crops her wages or earnings, within sec. 7 of the Married Woman's Property Act, R. S. O. ch. 125;
2. That she was entitled to such crops as owner of the land, for the husband could not be said to be working the farm as head of the family, and the case was distinguishable, therefore, from *Lett v. Commercial Bank*, 24 U. C. R. 552.
3. That the crops on both halves of the lot must be treated in the same way, the whole being managed in all respects as one farm.

INTERPLEADER issue, to try the right to certain crops claimed by plaintiff, seized by the sheriff on execution against the plaintiff's husband.

The case was tried at Cobourg, before Patterson, J. A.

The plaintiff with her husband and children lived on a 200 acre lot. They were married in 1864. The land belonged to the husband's father. In 1873 or 1874 he died, having devised half of the lot to the plaintiff and the other half to her son, a boy of about ten years of age.

The defendant was the execution creditor of the husband on a judgment obtained many years before the death of the father.

The case was tried without a jury, and the learned Judge pronounced the following judgment:—

“ This action is a proceeding under an interpleader, in which the property in question consists of the crops grown upon different portions of a 200 acre farm, the east half of which is devised to the son of the plaintiff and her husband, and the west half of which is devised to the plaintiff herself ‘and the heirs of her body for the life of her husband, Robert Ingram.’

“ It appears that, under what is conceded on both sides to be a misapprehension of the legal effect of the will, the 100 acres devised to the son have been occupied along with the 100 acres devised to the plaintiff, as if she was entitled to that 100 acres until the son came of age. This she concedes was the idea she always had in respect to that particular portion of the farm.

“ It is not made very clear what portion of these crops was grown upon one part or the other. I think Shillington is the only one who gives any distinct evidence on that point; the husband professes to know nothing about it at all. According to Shillington the meadow was on the plaintiff's half, the west half. Of the fall wheat there were about three acres on the east half—the son's part; the spring wheat he could not tell, but as I understood from him it was partly on one half and partly on the other. If it were necessary to give a decision on the question of fact, I should simply have to take it as a matter of fact that there was half on one half and half on the other; and the same with the oats; he could not tell how much was on one half and how much on the other. Of the barley he tells us about ten acres were on the east half and three acres on the west. I think these were the whole of the crops seized; and if a division has to be made between what was grown upon one portion and upon the other, it will have to be done in the way I have indicated.

“ The farm seems to have been occupied with the understanding, as I have mentioned, that it was the wife's right to occupy it as between her and her husband. The object of the devise in the peculiar shape that it took, *i. e.* devising the land not to the son of the testator but to his wife and to his children, I have no

doubt was what was indicated by the evidence, that it should not be under the control or subject to a judgment which existed against the son at the time of the testator's death, and which is the same judgment upon which this execution has now been issued, and which I suppose from something said was obtained in an action for seduction. I have no doubt that was the object of the peculiar shape of the devise. Although there is no direct evidence as to that, still it strikes me that was what dictated the shape the devise took. If this were so, and I have no doubt it was so understood by all the parties interested, that was why, and it affords a reason—if any reason outside of the direct evidence in the case were necessary to be looked for—why they were on the alert in all their transactions, and why they might be on the alert in all their transactions to preserve the position of this being the wife's property and not the husband's. The question is, whether the mode of dealing in respect to the working of the farm has had the effect of making the crops the husband's to the extent of enabling his creditor to seize them as against the wife.

My opinion is at present very decidedly against the application of the 7th section of the statute, R. S. O. ch. 125. I think it is quite clear that these were not her wages or earnings in the sense in which those words are used in the statute. I think it is also quite clear that she was not carrying on any occupation or employment separate from her husband. If the working of the farm was an occupation or employment, or *trade*, which I believe is the wording within the meaning of that clause, it was not carried on separate from the husband, because whatever she did about the place was simply what any farmer's wife would do about the place of her husband. In fact, although the husband was not doing the work on the place of an able man, still whatever he did was done upon the place, and what he did was more than she did, so far as actual labour or occupation of carrying on the farm was concerned. I do not think there was an occupation or trade carried on by her separate from her husband so as to bring her within the seventh section.

“The question in my mind turns upon her being the owner of the land, and making no distinction between the part that was hers and the part that was the son's, and the husband being concerned in the working of it to the extent the evidence has shewn. I think the work of the farm went on very much as the work of any farm, where the farmer is a lazy do-little kind of man, would go on. He did very little about the place, just as any other lazy man might do, but still whatever work he did do was done there. I think the parties all apprehended that the farm was hers. It was a matter well and publicly known. The men who worked at the farm knew that by being told it. Nichols knew it as well as the rest; not from being told as to how the will had disposed of the property, but from the direct statements of the parties while he was

working there. There is no doubt from that evidence it was well known that the land had been left in this particular way, and that the place was hers. I think the work done upon the place was done by persons who were employed by the intervention of the husband, but always in concert and in connection with the direct understanding with the wife that it was her farm, and that she was the owner for whom they were actually working. I think Mrs. Ingram's evidence, upon the whole, gives as fair a statement of the position as any of the evidence which has been given here. I do not think it is really added to by any of the evidence given afterwards, the evidence given by the reliable witnesses, Mr. Wilson and Mr. McDonald, and then Mr. Nichols. However that evidence corroborates what she says, I do not think it adds anything to it."

The learned Judge then proceeded to comment on the evidence of several of the witnesses, and speaking of the wife's evidence, continued: "Her evidence in the first place goes as if she was carrying on the whole business without intervention on the part of her husband; but it was qualified by her cross-examination, it being shewn that the husband was doing what a lazy man might do about the farm, conveying her orders possibly, but still being the medium of communication with the men; doing chores, feeding the cattle and the pigs, going to market, so far as ascertaining the state of the market, buying whatever had to be bought, implements or grain, or anything else, and doing in that way work which would have had to be done by somebody else if he had not been there. It does not strike me, however, that the part taken by the husband in that way in carrying on the work of the farm created the position that existed in the case of *Lett v. The Commercial Bank*, 24 U. C. R. 552. I think, so far as the facts of that case are present to my mind just now, there was a very material distinction, in the circumstances to which I have adverted, viz., that the parties here had before their minds apparently all the time the intention that this should be the wife's and not the husband's property; that a debt and execution existed against the husband, and that the wife and family were to have the benefit of this farm, and were not to be deprived of that benefit by any execution against the husband. I think that was the object of the form in which the testator left it, and that was always present to the minds of the parties; and I think that, having regard to that and to what we heard all through the evidence, we cannot say that the husband was really working that farm, as the head of the family, for the purpose of providing for his family. I think the farm was being worked for that purpose, but not by him as head of the family. It was being worked without that particular character being attached to the position that afforded the ground for the decision in *Lett v. The Commercial Bank*. I do not know on what authority, except *Lett*

v. *The Commercial Bank*, I could hold that the mere fact of the husband working the wife's property could render the produce of the farm liable to be seized for his debts, and my present impression is that this case is unlike *Lett v. The Commercial Bank* in this particular.

"I have already said that I do not think the plaintiff's case derives assistance from the 7th section of the Act, stating that I think her right must rest on the fact that this land is her land and the crops are the produce of the land. There is no evidence that the crops have been produced by any capital or money except what was in the land itself. The fact is, that whatever money has been paid, whether for stock, implements, or labour, has been paid from the place. Therefore the crops now in question are produced by the land itself, produced by the implements, etc., purchased by the land itself; for although there was a large amount of chattel property left by the will, I am not prepared to say that any can be now traced on to the farm. I think we must take it that the whole subject of the present litigation is the produce of the farm.

"Then, in deciding upon these questions of fact, there is no doubt room for a good deal of observation upon the very peculiar position the husband occupies, not being in the exact position of a hired farm servant, and not receiving wages or anything of that kind. That would be a circumstance, probably a very strong circumstance, if not met by others, to indicate that the farm was really being worked for his benefit, and that this was a proceeding in which the wife was put forward for the purpose of claiming property which was really her husband's. I think the other circumstances in the case, however, prevent any such idea here. The property coming in the way it does under the will I should therefore, as far as the wife's half of the property is concerned, and the produce which came off it, feel that my proper course at present would be to enter a verdict for her, leaving the legal questions, which are some of them rather new. Although many questions under the 'Married Women's Property' legislation have been litigated and decided, these I think are outside anything that has yet come up for decision. At present, I do not think, as far as the wife's half is concerned, there would be any object in doing otherwise than entering a verdict for her, and leaving the questions to be raised by a motion against it.

"As to the half which belongs to the son, Mr. McCarthy thought that should be treated in the same way as the other, because the actual misunderstanding or mistake of the parties was that it stood in the same position as the other portion. I do not think that is the case. I do not think I should treat it so. I think the wife's right to succeed, so far as her portion is concerned, depends upon the legal right which the will gives her, holding as I do that

she is not assisted by those other sections of the statute, and that her right depends upon the fact that the land is hers and that this is the produce of her land. I do not see how to apply the same rule to land which she merely believed to be hers, and which was worked by the husband jointly with her. I do not see that that rule can apply so as to give her the right. The question here, however, is between her and her husband's execution creditor. She is the plaintiff in this action. The whole of these crops appear to be confused together, so far as the actual work and possession is concerned. If as to one-half of them, that is, the half belonging to the son, the proper construction would be that the possession of them was in the husband, it was possession of a joint character with her, although it is a little anomalous to talk of the joint possession of husband and wife. It was a joint possession in that peculiar sense that it was confused with the possession which clearly was hers, in my judgment, of those crops which grew on her own part of the land. I think it is a matter of form more than anything else whether she should technically succeed in this action or not, because I have no doubt the execution creditor of the husband could not take them as against the son. I think that if he recovered in this particular form of action it would merely be to give rise to another question as to the son's right to have them brought into a proper account for his benefit, and prevent the execution creditor from taking them. I do not know that the father could, under any doctrine of guardianship, appropriate the produce of the son's portion for himself.

"That is one question I do not care to decide at present. I speak of it, and separate it from the other to the extent I have done—as I said at the commencement of my remarks—separating the crops themselves as far as I can, so that any motion to reduce the plaintiff's verdict by that share of the crops may take as definite a form as possible. I think there is a great deal to be said on both sides as to the plaintiff's right to succeed, although I think it is probably more of a technical question than a practical one. The evidence covers whatever ground can be raised in argument respecting the right of the son and the extent to which this is involved with the question of possession in the husband or in the wife, and I do not think any useful purpose will be served now by my endeavoring to make a separation and enter a verdict piece-meal. I think the most convenient plan will be to dispose of the case now by entering a verdict for the plaintiff, and leaving the defendant at liberty to move on the various questions of law and on this question of the crops which grew on the land of the son.

"I dispose of the question now by entering a verdict which is to some extent a formal one, the result of the views which I entertain."

November 15, 1880. *J. W. Kerr* obtained a rule *nisi* to enter a verdict for the defendant on the law of evidence.

February 8, 1881. *McCarthy*, Q. C. shewed cause. The west half is the separate estate of the wife, and the right of property in the crops follows the right of property in the land; and as the right of property in the west half is the separate estate of the wife, the right of property in the crops is also her separate estate; and as to both halves the evidence shews that the business of farming was carried on by the wife separately from her husband—that the crops on both halves were the proceeds or profits of an occupation carried on by the wife separately from her husband; and the plaintiff has therefore brought her case within sec. 7, and is entitled to succeed.

J. W. Kerr, contra. The crops raised on the east half of the lot were not the plaintiff's, because the plaintiff had no interest in the land, which was devised to her son, a lad of eight years, and because the plaintiff, as the evidence fully established, and as the learned Judge who tried the case found, was not carrying on the business of farming separately from her husband. The crops were not the proceeds or profits of an occupation or trade carried on by the wife separately from her husband, and the wife therefore cannot claim them under sec. 7 of ch. 125, R. S. O.; and the Judge found the facts to be, that the plaintiff had not by the evidence brought her case within sec. 7. Unless the plaintiff shew title in herself to the crops on her son's land she must fail, or if the evidence shew title out of her she must fail. The issue in an interpleader is not whether the defendant had a right to seize the goods, but whether the plaintiff owned the goods: *Grant v. Wilson*, 17 U. C. R. 144; *Godson v. Barrow*, 9 Ex. 514; *Green v. Stevens*, 2 H. & N. 146. These cases establish that if plaintiff do not shew title in herself, as she has not here, she must fail. Then as to the crops raised on the west half, which was held by the plaintiff under a devise from her husband's father. Those crops were not the property of the plaintiff, because they were not the proceeds

or profits of an occupation or trade carried on by the plaintiff separate from her husband ; and the evidence clearly shews, and the Judge has found the facts to be, that the business of farming was not carried on by the plaintiff separate from her husband, and that she has not brought her case within sec. 7. The land itself is not the separate estate of the plaintiff, as she was married before the Married Women's Act of 1872 (in 1866). The facts brought the case within sec. 3, and not within sec. 4 of ch. 125 R. S. O. Under sec. 3 the wife does not hold her land for her own separate use free from any estate of her husband during his life, and free from any claim by the curtesy, nor the rents, issues, and profits thereof, as under sec. 4. If her case be within sec. 4 she can hold the land for her own separate use free from any claim of his by the curtesy, and also the rents, issues, and profits thereof ; but not so if sec. 3 governs her case. Under sec. 3 the husband is jointly seized with his wife during coverture, and therefore the crops which grew on the west half could not be the separate estate of the wife, because the land itself was not the separate estate of the wife : see *Robertson v. Norris*, 11 Q. B. 916 ; *Allan v. Levesconte*, 15 U. C. R. 9 ; *Doran v. Reid*, 23 C. P. 393 ; *Nolan v. Fox*, 15 C. P. 565 ; *Emrick v. Sullivan*, 25 U. C. R. 105 ; *Johnston v. McLellan*, 21 C. P. 306, 307 ; *Wright v. Garden*, 28 U. C. R. 614 ; *Furness v. Mitchell*, 3 App. R. 510 ; *Dingman v. Austin*, 33 U. C. R. 190. Whether the crops were the separate property of the wife depends upon whether or not the business of carrying on the farm was the separate business of the wife or not ; and as the facts shew and the Judge has found that the business was not carried on by the plaintiff separately from her husband, and that she had not upon the evidence brought her case within sec. 7, she must fail. As to both the east half and the west half the evidence clearly established, as the Judge found, that the business was not carried on by the wife separately from her husband ; see *Harrison v. Douglas* 40 U. C. R. 410 ; *Lett v. Commercial Bank*, 24 U. C. R. 552 ; *Foulds v. Curtelett*, 21 C. P. 368 ; *Meakin v. Sampson*, 28 C. P. 355 ; *Laporte v. Costick*, 31 L. T. N. S. 434.

March 11, 1881. HAGARTY, C. J.—I think the learned Judge has arrived at the right conclusion on all matters of fact as to the wife's own land. Even if I felt inclined not to view them exactly in the same light, I feel, as I always do, that a well considered verdict of an experienced Judge ought to be (at the very least) treated as the finding of an intelligent jury.

But even without his advantage in seeing the witnesses, I agree in his conclusions. I think he has rightly distinguished the evidence in this case from that in *Lett v. Commercial Bank*, 24 U. C. R. 552. I have carefully examined that case again. Draper, C. J., points out what the presumption of law would naturally be when the husband and wife occupy a farm together. "The evidence shews the farm is worked by the husband, and without any evidence he is to be deemed the head of the establishment, having the rights and subject to the liabilities of the master of the family. * * In the absence of any evidence to the contrary, it seems to me the reasonable presumption is that Dr. Lett was tenant of the land on which these crops were growing, and the evidence of a neighbour, one of the claimant's witnesses, gives colour to this presumption when he says "Dr. Lett is the managing farmer as far as I know." If he is in fact the occupant, farming the land, the growing crops were his, and were liable to an execution against him. * * Whether her's or her husband's depends on which of them was the occupant in fact and in law of the premises on which they grew; and that is a question which has not been submitted to the jury."

The evidence given in the present case I think takes it out of the operation of *Lett v. Commercial Bank*. Since that case was decided we have had further legislation in favour of preserving, as far as possible, the rights of the wife to her own property as against her husband's creditors, and a large number of cases have been decided fully recognizing the principle established by the Legislature, and tending to widen rather than to narrow the rights of married women.

This view would dispose of the claims to all the crops raised on the plaintiff's half of the lot.

The learned Judge considers that about half of the crops claimed were raised on her half, and the rest on the half belonging to her minor son.

It is argued to us that as regards the boy's half the law would consider the father to be his natural guardian.

If that be the true position, and if such guardian had cropped and used the land for his benefit, I think the crop so raised would be the property of the guardian, subject to the right of the son to have an account taken. The guardian in such accounting would, I presume, be charged with a proper occupation rent. If he had let the land to tenants he would be charged with rents and profits. When he chooses to farm himself he would be chargeable with an occupation rent.

I assume the law to be so. There is, however, a great difficulty in applying it to such a state of facts as we have now before us.

As the learned Judge finds, everything was done by the wife as the manager of the farm. All that was spent on the farm in producing these crops seems to have come from the land, and her land and her son's land were treated in precisely the same manner.

The crops on the son's land were produced from the seed and labour which we find in the evidence she procured, and it seems impossible to separate one from the other.

If we apply the common law rule in its strictness we must assume the father to be raising crops on his boy's half, as the farmer thereof.

This assumption seems to stultify our finding as to the other half of the farm, where we consider the wife to be the master power, the provider and cultivator.

It seems painfully subtle to assume a totally different process of management and provision on one side of the line between the east and west halves, from that prevailing on the other side, on such evidence as is before us.

It would be equally fallacious to assume, that if on plain-

tiff's side she had, by trespass or mistake of survey, enclosed a few acres of a neighbour's field in her own, that the law must apply a different right of property in the crop produced on her own and on the neighbour's ground. I am fully aware that a decision in favour of her right to the whole seems to involve a logical fallacy. But we have to administer, to the best of our judgment, a law which necessarily may produce anomalous and sometimes startling results.

It can only be on the assumption that his father, as natural guardian of the boy, actually raised these crops, that they can become liable to his judgment debt. As a fact we find he did not so raise them: that they were raised by his wife, treating the boy's land exactly in the same manner as her own adjoining portion.

If the law, as it now stands, enables her to be considered the occupant and cultivator of the west half, it seems the merest fiction to assume a different state of facts as to the east half, when it is shewn that the management and treatment of each half was precisely the same, all being used as one farm.

If she, in the absence of her husband, had tortiously taken possession of and cropped her next neighbour's land, or trespassed unwittingly upon it, she would hold the crop against a mere stranger or wrongdoer. I do not see how to escape from the conclusion that as we hold her to be the true farmer and cultivator of her own portion, we must not also hold her to be in the same position as to the boy's part. To assume her to be managing and cultivating the east half on behalf of her boy, in the position (as it were) of his guardian, seems to me a less violent straining of facts and probabilities than to commit what I cannot but feel would be the absurdity of holding that there was a different process of management and culture applicable to each half of the one farm, in the face of the finding and the evidence before us.

This case is fortunately free from some of the unpleasant features so common to the claims of married women against

the creditors of the husband. There is no suggestion whatever that the husband had obtained credit from any person on his apparent position, as engaged in the cultivation of a valuable property. The claim seems to have been on an old judgment anterior to the existence of any interest of either husband or wife in this land.

I repeat that in arriving at the conclusion that the general verdict for the plaintiff should stand, I feel there is much to be said against it, and that the present state of the law and the very peculiar state of facts in this case compel me to adopt this view as the least objectionable that presents itself to me. I think, however, that my decision involves no practical injustice.

CAMERON, J., concurred.

ARMOUR, J., took no part in the judgment, having been concerned in the case at the bar.

Rule discharged.

MEMORANDA.

The following gentlemen were called to the Bar during this Term :—

GEO. A. SKINNER, JOHN PHILPOT CURRAN, REGINALD BOULTBEE, HARRIS BUCHANAN, GOODWIN GIBSON, WILLIAM JAMES THORLEY DICKSON, JAMES ALEXANDER ALLAN, WALTER ALEXANDER WILKES, JAMES HARLEY, WILLIAM WHITE, DANIEL ERASTUS SHEPPARD, WALLACE NESBITT, JAMES B. MCKILLOP, COLIN CAMPBELL, PHILIP HENRY DRAYTON, THOS. C. L. ARMSTRONG, JOHN DOHERTY, ALEXANDER DAWSON, THOS. DICKIE CUMBERLAND, J. GORDON JONES.

SITTINGS IN VACATION.

AFTER HILARY TERM.

IN RE McCORMICK AND THE CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH.

Loan for proposed school-house—Submission to electors—Sufficiency of—
42 Vic., ch. 34, sec. 29, sub-sec. 3.

It appeared from the affidavit of the secretary and treasurer of a school-section, that at two regularly called meetings of the duly qualified electors of a school-section at which a chairman was appointed, proposals to purchase a site, build a school-house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed, authorizing the issue of debentures to raise money for the above purposes.

Held, that under 42 Vic., ch. 34, sec. 29, sub-sec. 3, this was a sufficient submission to and approval of the proposal by the duly qualified school-electors of the section, and a rule to quash the by-law was discharged.

ON the 3rd of December, 1880, in single Court, before Osler, J., *Bethune*, Q.C., obtained a rule *nisi* on behalf of Theron McCormick, calling upon the corporation of the township of Colchester South to shew cause why a certain by-law of the said corporation known as By-law No. 12 of the said corporation, and entitled "A By-law authorizing the Public School Trustees of School-Section No. 6, in the township of Colchester South, to borrow the sum of \$1,700 for the purpose of purchasing a school-site and building a school-house thereon," passed on the 24th day of July, 1880, should not be quashed, with costs to be paid by the said corporation to the said Theron McCormick, on the following grounds: 1. That the said by-law did not purport to charge all the lots of land which formed parts of

the said school-section, but unjustly omitted a large number of lots of land. 2. That it did not appear that the proposal to borrow the said sum of \$1,700 was submitted to and approved of by the duly qualified school-electors of the said school-section before or since the passing of the said by-law;—with liberty to the applicant to file a further affidavit that the proposal to borrow the money in the by-law was not submitted to the electors of the school-section and approved of by them either before or since the passing of the by-law.

In support of the rule he filed the affidavit of the applicant, to which were annexed eight by-laws of the said township affecting public school-section number six, and in which the applicant stated, among other statements unnecessary to be here set out, that to the best of his knowledge and belief there were certain lots, and parts of lots, that properly belonged to public school-section number six, in the said township, that were not included in the first clause of the by-law sought to be quashed, as comprising a part of said school-section, and that there were certain lots, and parts of lots, that did not properly belong to the said public school-section number six, which appeared in the said first clause. In the supplementary affidavit filed by the applicant, under the liberty granted in the rule, he stated that there was a meeting called for school-section number six, in the township of Colchester South, on the 15th day of November, A.D. 1879, to take into consideration to ascertain whether a sum of money could be raised to build a school-house for public school-section number six: that to the best of his recollection there was nothing definite done, and there was no approval to borrow any certain sum of money, and, to the best of his knowledge and belief, no proposal to borrow the sum of \$1,700, was submitted to and approved of by the duly qualified electors of the said school-section, either before or since the passing of the by-law number twelve of the said township of Colchester South.

The by-law moved against recited that the public school

trustees of school-section number six, in the township of Colchester South, had applied to the township of Colchester South for authority to borrow the sum of \$1,700, which the said trustees found necessary for the purchase of a school-site, and for building a school-house: that the said school-section number six comprised the following lots, and parts of lots (naming them): that the whole taxable property of the said section was \$59,915: that it would require the sum of \$1,700, with interest at the rate of six per cent. per annum, to be raised annually by special rate, for the payment of the debentures and interest thereafter mentioned: that the debt to be thereby created was created on the security of the said special rate, and of that only; and enacted that it should be lawful for the public school trustees of school section number six, to borrow from any person or persons, body or bodies corporate, who might be willing to advance the same upon the credit of the debentures thereafter mentioned, a sum of money, not exceeding in the whole the sum of \$1,700, for the purpose and with the object mentioned in the recital: that the reeve should cause certain debentures to be issued (describing them): that such debentures should be payable at certain dates (fixing them): that for the purpose of providing a fund for the payment of the said debentures and interest, an equal special rate in the dollar sufficient to retire one debenture and the interest on the amount unpaid, should, in addition to all other rates, be raised, levied, and collected in each year on all the taxable property of the said school-section, and upon such other taxable property as was by law made liable in case of an alteration in the boundaries of said section during the term of ten years (that is, during the years in which it was provided that the debentures should be payable, the first being payable August 1st, 1881,) and that that by-law should come into force and take effect on the 1st day of August, A.D. 1880.

It appeared from the affidavit of the clerk of the township that all the lands mentioned in by-law No. 12, and referred to in the rule *nisi* herein, were the lands

included in said school-section No. 6, and no lands were omitted. It also appeared from the affidavit of the secretary and treasurer of school-section No. 6, in the township of Colchester South, that a meeting was duly called according to law, in the township of Colchester South, for the 18th of October, 1879, when Thomas Clark was chosen chairman, and the following resolutions were moved and carried: "Moved by Mr. David Davey, and seconded by Mr. Benjamin Davey, that the site for a new school-house be on Mr. T. McCormick's land, nearly opposite the house lately occupied by Samuel Woodmiss." ("Carried.") "Moved by Mr. Davey, seconded by Henry Walton, that the new, school-house be of brick." ("Carried.") "Moved by Mr. Edward Shaw, seconded by Mr. David Davey, that the sum of two thousand dollars (\$2,000) be raised off this section for the purpose of building a new school-house." ("Carried.") That a second meeting was duly called according to law in said township of Colchester South, for the 15th of November following, when Thomas Clark was chosen chairman, and the following resolutions were moved: "Moved by Mr. Angus Lockwood, seconded by Mr. Edward Shaw, that the money required for building a school-house be raised by way of loan." "Moved in amendment by Mr. Thomas McLean, seconded by Mr. Lennox Thompson, Jr., that the money be raised from the ratepayers as soon as the school-house is built": that the amendment was lost and the original motion of Mr. Angus Lockwood was carried: that at the first of said meetings it was asked by parties present what amount would be required to be raised for building said school-house, when a builder present stated that it would require the sum of \$2,000: that after the said first meeting, and before the said second meeting, an estimate was received by the deponent from an architect, stating that the amount required to build said school-house would be the sum of \$1,700, which estimate was produced and read at said second meeting, and no objections made to the same by any parties present, whereupon an application was

made to the municipal counsel to raise said sum of \$1,700.

The affidavit of one McGill, one of the school-trustees of school-section No. 6, in the said township of Colchester, stated that he had heard read the said affidavit of the said secretary and treasurer, and that said affidavit was correct and true: that he attended each of the meetings held on the 15th of November and the 18th of October respectively, and heard these resolutions referred to in the said affidavit proposed and carried, after the same had been discussed.

On February 11, 1881, *J. K. Kerr*, Q. C., shewed cause. It is not shewn that any part of the section had been omitted from the by-law. From the affidavits filed in reply it appears that certain portions have from time to time been taken from this section and added to other sections, or that other sections have been created from portions of this one. The by-law does not come within the provisions of the Act of 1878, requiring the proposal to borrow to be submitted to and approved by the ratepayers of the section. Those provisions only apply to a case where the township council refused in the first instance to pass a by-law to raise the required funds, and at all events, there was a sufficient submission to and approval by the ratepayers.

C. Moss, contra. The affidavits filed in support of the rule, and the copies of by-laws shewing the extent of territory included in the various sections shew that some portions of the sections were not included in the by-law in question. The provisions of the Act of 1878 clearly apply to every loan of the character of this, *i. e.*, money for erecting a school-house. In order to have a proper submission and approval by the ratepayers, there must be a meeting, duly called in accordance with the provisions for calling meetings of ratepayers of rural school-sections, for the purpose of considering the proposal, and a resolution carried by a majority of those present, or, upon a poll being demanded, of those voting upon it. There was no evidence of any notice to the ratepayers of the intention

to submit the proposal, and none of any approval in due form to the ratepayers.

March 1, 1881. ARMOUR, J.—The material upon which the by-law in question is sought to be quashed, is certainly of the most vague and unsatisfactory character, and is of doubtful sufficiency, even if unanswered, to support this application.

The applicant does not specify in his affidavit, in support of the first ground taken in the rule, what lots or parts of lots properly belonging to public school-section number six have been omitted from the by-law, nor what lots, or parts of lots not properly belonging to that section, have been included in the by-law, but contents himself with stating that to the best of his knowledge and belief there are certain lots and parts of lots properly belonging to that section that have been omitted from the by-law, and that there are certain lots and parts of lots not properly belonging to that section that have been included in the by-law, leaving to the Court the task of testing the accuracy of the best of his knowledge and belief, and of finding out the truth by an investigation and comparison of the eight different by-laws of the township which accompany his affidavit, and which were passed at different times during the last thirty years, changing from time to time the boundaries of that section. This task of ascertaining what, if any, lots or parts of lots have been improperly included in, or omitted from the by-law, the applicant ought not to expect the Court to be able to perform, when he, a resident of the school-section, is unable to do it.

His affidavit in this respect is, however, fully answered by the affidavit of the township clerk, that all the lands mentioned in the by-law are the lands included in that section, and that no lands included in that section are omitted from the by-law.

The applicant has therefore failed to establish the first ground taken in his rule.

The other ground taken in the rule requires the determination of the question whether the proposal to borrow the sum mentioned in the by-law was submitted to and approved of by the duly qualified school-electors of the section, in pursuance of 42 Vic. cap. 34, sec. 29, sub-sec. 3.

R. S. O. ch. 204, sec. 102, sub-sec. 25, makes it a duty of the trustees of every rural school-section to appoint the place of each annual school-meeting of the assessed freeholders and householders of the section, and the time and place of a special meeting of the same, for (1) the filling up of any vacancy or vacancies in the trustee corporation occasioned by death, removal, or other cause; or, (2) for the selection of a new school-site; (3) the appointment of a school auditor, or (4) any other lawful school purpose, as they may think proper; and to cause notices of the time and place, and of the objects of such meetings, to be posted in three or more public places of the section, at least six days before the time of holding such meeting, and provides (sub-section 25 *a*) that every such meeting shall be organized, and its proceedings recorded in the same manner as provided for in the forty-fifth and three following sections of this Act, which are as follows: Section 45. "The resident or non-resident assessed freeholders, householders, or tenants of such school-section present at such first meeting shall elect one of their own number to preside over its proceedings, and shall also appoint a secretary, who shall record the proceedings of the meeting, and perform all such other duties as may be required of him by this Act." Section 46. "The chairman of the meeting shall decide all questions of order, subject to an appeal to the meeting, and in case of an equality of votes he shall give the casting vote, but he shall have no vote except as chairman." Section 47. "The chairman shall take the votes in the manner desired by a majority of the electors present; but he shall, at the request of any two electors, grant a poll for recording by the secretary the names of the voters present." Section 48. "At the first school-section meeting, the electors present shall, by a majority of votes, elect from the resident

assessed freeholders, householders, or tenants in the section, three trustees."

The mode, therefore, and the only mode provided by the school-law for submitting such a proposal to and obtaining the approval thereof by the duly qualified school-electors of a section, is by the trustees appointing a time and place of a special meeting of the assessed freeholders and householders of the section for that purpose, and causing notices of such time, place, and object to be posted in three or more public places of the section, at least six days before the time of holding such meeting.

The very meagre affidavit of the applicant in support of the ground taken in the rule, that the proposal in question was not submitted to or approved of by the duly qualified school-electors of the said section, does not point out that this mode was not adopted, and the affidavit of the secretary and treasurer that the meetings referred to in his affidavit were duly called according to law, would seem to shew that it was adopted. At all events, sufficient does not appear upon the materials before me to enable me to hold that it was not adopted.

If it was adopted, then I think that what took place at the said meetings, as set forth in the affidavit of the secretary and treasurer, was a sufficient submission to, and approval by the duly qualified school-electors of the section of the said proposal to meet the requirement of 42 Vict. ch. 34, sec. 29, sub-sec. 3, and that the rule must be discharged, with costs.

Rule discharged, with costs.

IN RE RUSHBROOK AND STARR.

Arbitration—Oaths of witnesses dispensed with.

Held, that under R. S. O. ch. 50, sec. 224, the witnesses on an arbitration must be examined upon oath, unless there is a positive agreement or consent to the contrary. Such consent or agreement may be shewn *dehors* the submission, and in this case, upon the affidavits filed, it was held to be sufficiently made out; but

Semble, that it cannot be inferred from the absence of objection or mere acquiescence.

J. E. McDougall obtained in the full Court, in Hilary Term last, a rule *nisi*, on behalf of George Rushbrook, calling on Charles Starr to shew cause why the award made between the parties, dated the 26th day of November, A.D. 1880, should not be set aside, on the ground that the arbitrators refused to swear the witnesses, and had misconducted themselves in so refusing.

The award was made under a voluntary reference to three arbitrators of all matters in difference between the parties.

March 1st, 1881. *McMichael*, Q. C., shewed cause. Under section 224 of the Common Law Procedure Act, R. S. O. ch. 50, it was not imperative on the arbitrators to administer an oath. The agreement of the parties to dispense with the same may be inferred from the absence in the submission of any direction to take the evidence under oath; or, in this case, from the conduct of Rushbrook, who did not raise the objection until the second day of the arbitration, and who, after the ruling of the arbitrators, went on with his case by examining witnesses. If a party to a reference, after objecting, goes on and takes his chances of an award, he will be precluded from taking this objection: *Allan v. Francis*, 9 Jur. 691; *Atkinson v. Jones*, 1 D. & L. 225. At any rate, the applicant expressly assented, as appears by the affidavits.

J. E. McDougall, contra. There is a very marked distinction between the policy manifested by our Legislature by clause 224 of the Common Law Procedure Act

in connection with arbitrations, and that evidenced by the English Acts on the same subject. Formerly, in England, the arbitrators had no power to administer oaths to witnesses, and the witnesses, when required to be sworn, would have to be sworn before a Judge. Then 3 & 4 Wm. IV. cap. 42, was passed, which authorized arbitrators to administer an oath in cases where the submission contained a provision to have the evidence under oath, and a provision that the submission might be made a rule of Court. The arbitrators subsequently were empowered to administer an oath, and finally, 14 & 15 Vic. cap. 99, was passed, and by section 16, every arbitrator having authority to hear and receive evidence could administer an oath. The first Statute, of Wm., gave only limited power in certain cases, and the second Statute, of Vic., merely authority to the arbitrator in any case to administer an oath, but no direction to do so. Under our statute it is different; our law is imperative, and the arbitrators were bound to swear the witnesses unless the parties *expressly agreed* to dispense with it. No conduct of the parties could have any effect in waiving their rights short of an express assent to dispense with sworn testimony. No assent would be implied. The fact of the absence from the submission of a direction to examine the witnesses under oath, could not be construed into an agreement to dispense with it. The Legislature evidently intended that the proceedings before a board of arbitrators should be as formal and solemn in the manner of taking evidence as in any other Court, and nothing short of the *express agreement or consent* of the parties would avail anything. The words "*agree or consent*," shew that in this view the English cases on the subject are easily distinguishable. They were decisions under a different law, and therefore not applicable to this case. He cited *Davies v. Price*, 34 L. J. Q. B. 8; *Ringland v. Lowndes*, 33 L. J. C. P. 337.

March 8, 1881. CAMERON, J.—By section 224 of chap. 50, R. S. O., it is enacted: "The witnesses upon any such

reference, *shall*, unless the parties otherwise agree or consent, be examined upon oath, and the referee, arbitrator, or umpire, or any one arbitrator, shall administer an oath to such witnesses, or take their affirmation in cases where an affirmation is allowed by law instead of an oath."

I think this provision makes it imperative upon an arbitrator to take the testimony of witnesses under oath, unless there is a positive agreement or consent to the contrary, and though not necessary to the decision of this case, upon the facts disclosed by the affidavits filed, I incline to the opinion that such agreement or consent cannot be inferred from the absence of objection or mere acquiescence. The provision in its present shape first appeared in 36 Vic. ch. 12, sec. 3, Ont., and was enacted in substitution for section 182, ch. 22, C. S. U. C., which was as follows: "In case in any rule or order of reference, or in any submission to arbitration, it is ordered or agreed that the witnesses upon such reference shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, shall administer an oath to such witnesses, or take their affirmations in cases where an affirmation is allowed by law instead of an oath."

From the change it would seem that the Legislature intended to make this solemn way of giving evidence as essential in the case of an arbitration as in a Court of justice, unless the parties interested desired it should be otherwise. And the first question in the present case is, can the consent or agreement be shewn otherwise than by the submission itself? If it cannot, as there is no consent or agreement on the subject therein, the award would be bad; but the statute does not provide that the submission, rule, or order of reference, must contain the consent or agreement; it only requires the witnesses to be examined upon oath, unless the parties consent or agree otherwise; and I see no objection to the consent or agreement being shewn *dehors* the submission. And that brings me to the facts of this case as presented in the affidavits filed.

The applicant Rushbrook, in his affidavit, though not as

circumstantially as it ought to be done, made out a *prima facie* case of an examination of the witnesses without their having been sworn, not only without his actual consent, but, as to those examined at the second sitting of the arbitrators, against his positive protest. The affidavits filed in answer completely meet the case he has presented, and shew an actual consent to the arbitrators proceeding with the examination in the way it had begun, that is, without the witnesses being sworn.

During the argument I was under the impression the affidavits filed in answer did not fully meet the case made on obtaining the rule, but a more careful examination of them establishes a most direct and unequivocal answer, and by so many parties the matter is not left in any reasonable doubt. If it had been, I should have held the doubt should have been resolved in favour of the applicant, as the statutory requirement had not been fulfilled.

As to whether there was consent or not is a question of fact to be determined, as in ordinary cases, by the evidence and weight of evidence; and the preponderance of testimony in this case against the applicant is too strong to admit of reasonable doubt that there was a protest on his part against the examination of witnesses unless upon oath, followed by a discussion between him and the arbitrators, and a consent induced thereby to the examination proceeding as it had begun. The undisputed fact that he took his witness Bowerman back after the examination had closed, to make some statement in his favour omitted by this witness, would by itself shew a desire to avail himself of the benefit of the unsworn testimony, and a clear acquiescence in the manner of examination, and is a strong circumstance, taken in connection with the arbitrator's account of what passed between him and them, to support the correctness of that account. The rule must therefore be discharged.

Rule discharged.

REGINA EX REL CLANCY V. ST. JEAN.

*Alderman—Declaration of qualification—R. S. O. ch. 174, sec. 265—
Quo warranto.*

The declaration required by the Municipal Act R. S. O. ch. 174, sec. 265, from every person elected under the Act to any office requiring a property qualification, is a pre-requisite to the discharge of the duties of such office.

Where an alderman elect did not state in his declaration the nature of his estate in or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada," *Held*, that the declaration was insufficient.

Held, also, that his right to the office on this ground, and for the want of a qualification at the time of his election, might be questioned by a *quo warranto* at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White v. Roach*, 18 U. C. R. 226, and *Kelly v. Macarow*, 14 C. P. 457, distinguished.

Held, also, that the relator was not too late, having applied in the next Term after the election, and only one day after the time for moving under the statute.

On the 18th day of February, 1881, McMichael, Q. C., obtained a rule *nisi*, returnable in Court before a single Judge, on behalf of John Clancy, calling on Pierre St. Jean to show cause why an information in the nature of a *quo warranto* should not be exhibited by the Master of the Crown Office, on the relation of John Clancy against him, to shew by what authority he claimed to exercise the office of Alderman of the City of Ottawa for the present year—upon the ground that he was not qualified to be or act as an Alderman of the said city, inasmuch as he had not made and subscribed a declaration as required by the statute in that behalf, and he had not at the time of his election to such office, to wit, on the 27th December last, in his own right or in right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable, rated in his own name on the last revised assessment roll of the said city of Ottawa, over and above all charges, liens, and encumbrances affecting the same, to at least the value following; that is to say, freehold of \$1,500, or lease-

hold \$3,000, in this, that the east half of lot number seven on the south side of St. Patrick street, in the city of Ottawa, and mentioned in the affidavits herein of John Clancy, was not of the said value of \$1,500 over and above all charges, liens, and encumbrances affecting the same; and upon the grounds set out in the affidavits filed and read herein.

The affidavits on which the rule was granted set forth that the relator was an elector in Ottawa Ward, but not in By-Ward of the City of Ottawa: that he was subject to the city rates of the said city and the local jurisdiction of the Municipal Council of the city: that the city was divided into five wards: that at the nomination of candidates for the office of Alderman for the said By-Ward on the 27th of December, 1880, for the year 1881, there were only three candidates nominated, of whom Pierre St. Jean was one, and the said Pierre St. Jean and two other persons were declared duly elected to the said office: that since the said election, on or about the 17th day of January, 1881, the said Pierre St. Jean made and subscribed before William Pittman Lett, City Clerk of the said city of Ottawa, a declaration of qualification, in the words and figures following: "I, Pierre St. Jean, do solemnly declare that I am a natural born subject of Her Majesty; that I am truly and *bona fide* seised and possessed to my own use and benefit of such an estate, to wit, a freehold property, consisting of the east half of lot No. 7, on the south of St. Patrick street, in the City of Ottawa, as doth qualify me to act in the office of Alderman for the City of Ottawa, according to the true intent and meaning of the Municipal laws of Upper Canada:" that the said Pierre St. Jean had made no other declaration of qualification, and had since taken upon himself the office of Alderman, and had assumed to be an Alderman of the said city, and had attended and voted at meetings of the Municipal Council for the said city: that the said property, consisting of the east half of lot No. 7, on the south side of St. Patrick street, was assessed on the last revised assessment roll for the said city for the sum of

\$1,500 and no more ; that the said Pierre St. Jean did, by deed by way of mortgage, bearing date the 8th August, 1879, encumber the said half of the said lot to La Société de Construction Canadienne d'Ottawa, for the sum of \$1000, with interest thereon, at the rate of ten per cent. per annum, and the said encumbrance was in force and effect, and formed a lien, charge, or encumbrance on the said half of the said lot at the time of the said election ; and that the application was made at the instance of the said John Clancy as relator ; also, that the said property was the only property assessed to the said Pierre St. Jean on the last revised assessment roll.

On the 11th March, 1881, *J. W. W. Ward*, shewed cause, and contended that the application was made too late : that it should have been made within six weeks after the election, as St. Jean had on the day of his election declared that he accepted the office, and the time for moving was limited by the Municipal Institutions Act to six weeks after the election, or four weeks after the acceptance of office : that the relator Clancy was present at the nomination and made no protest or objection whatever to the return of the said St. Jean, and declared openly at different times if the said St. Jean had been a candidate for the mayoralty, for which office the said Clancy was a defeated candidate, he, Clancy, would not have opposed the said St. Jean. He also contended that the relator, under the Municipal Act, not being an elector or candidate in By-Ward, had not the requisite interest to qualify him as relator against the said St. Jean. He cited *Regina ex rel. White v. Roach*, 18 U. C. R. 226, *Kelly v. Macarow*, 14 C. P. 457, and other authorities not necessary now to refer to. He further contended, as shewn by the affidavit of St. Jean filed, he had in fact the property qualification necessary to qualify him, and that it was from ignorance of the amendment made in clause 70 of the Municipal Act, by the Act 43 Vic. ch. 24, sec. 3, making a difference in the declaration of qualification necessary, his declaration was made in September. (In this affidavit he

swore that the buildings on lot No. 7 cost him \$1,800, and the land itself was worth \$500, and the encumbrance existing upon it at the time of the election was only \$400, so that in fact this property was a qualification ; but he owned, in addition, the west half of lot No. 20, on the south side of St. Patrick street, which was assessed on the last revised assessment roll at \$700.)

Mosgrove, contra, contended that, not having the right to avail himself of the provisions of the Municipal Institutions Act, to have the right to the office tried thereunder, not being an elector of the ward or a candidate, but having an interest in and being affected by the acts of the Municipal Council, as a rate payer of another ward in the city of Ottawa, he was in a position to contest the right of St. Jean to the office as a public corporate office, in the same way that he would have been had there been no provision in the Municipal Institutions Act for trying the validity of an election ; and he had not been guilty of any laches or delay in making the application : that until St. Jean took his seat or accepted the office by subscribing the declaration of qualification he had not exercised or usurped the office, and the relator was not in a position to move : that the acceptance of office had to be an actual one, by doing some act, and not merely by a statement to the electors present at the nomination, that he would serve them faithfully : that not being a voter in the ward he had no right at the nomination to make any protest, and his presence there did not preclude him from now objecting to the want of qualification, when none in the ward chose to do so : that the cases cited of *Reg. ex rel. White v. Roach*, 18 U. C. R. 226, and *Kelly v. Macarow*, 14 C. P. 457, while strong in language to support the contention of the other side, were different in their facts, as in these cases the relators had the right to avail themselves of the provisions of the Municipal Institutions Act, to oppose the election of the parties whose return they objected to, and to contest their right to the office, when elected, in the inexpensive manner provided by the Act ; and by their own default they had precluded

themselves from having the matter tried by an information in the nature of a *quo warranto*. He also filed an affidavit with an abstract of title attached, relating to the west half of lot twenty-six, on the south side of Ottawa street, in the city of Ottawa, showing that the title appeared to be in one William A. Ross, and not in the said St. Jean; but this was not the land St. Jean, by his affidavit, claimed to be interested in.

March 25, 1881. CAMERON, J.—I think the rule must be made absolute for leave to file an information in the nature of a *quo warranto* against the said Pierre St. Jean, upon the relation of the said John Clancy.

In *Re McPherson and Beeman*, 17 U. C. R. 99, which was an application for leave to file an information in the nature of a *quo warranto*, to try the right to the office of assessor of an incorporated village, Sir John Robinson, in his judgment, said: "I think an information in the nature of a *quo warranto* may go, in the case of such an officer, under the Statute 9 Anne, ch. 20, and that it might go at common law." If it might go in the case of an officer created by the corporation, it surely may with more reason go in the case of one of the governing body appointing to such office. Therefore, without feeling it necessary at present to concur in or dissent from the views expressed in the case of *Reg. ex rel. White v. Roach* and *Kelly v. Macarow*, referred to in the argument, I am of opinion that until a person elected a member of a municipal corporation has made the declaration of qualification prescribed by the 265th section of ch. 174 R. S. O., he has no right to exercise or discharge the functions pertaining to the office; and as the declaration of qualification made by Dr. St. Jean omits to state the value of the property in respect of which he claims to be qualified, and also that such value is over and above all charges, liens and incumbrances affecting the same, he has not made the necessary declaration.

This section 265 declares every person elected or appointed under this Act to any office requiring a qualification of pro-

perty in the incumbent shall, before he takes the declaration of office, or enters on his duties, make and subscribe a solemn declaration to the effect following. * * The form at the end contains the allegation: "And that such estate at the time of my election was of the value of at least, (specifying the value), over and above all charges, liens and incumbrances affecting the same."

The declaration made by Dr. St. Jean follows this form down to the words, "office of," and then contains the following words, "Alderman for the city of Ottawa, according to the true intent and meaning of the Municipal laws of Upper Canada," omitting all reference to the value of the property or incumbrances. I think there can be no doubt that this declaration is an essential pre-requisite to the discharge of the duties of the office of alderman, and that any rate-payer of the city of Ottawa would have the right, who was not precluded by some act of his own, to question the right of Dr. St. Jean to discharge the functions of an alderman; but as the latter can at any time put himself in a position to exercise the franchises of the office by making a proper declaration, his omission to make the declaration would not render the office vacant; and this result leads me to think the question of his qualification at the time of his election is, notwithstanding the provisions of the Municipal Act, open to be questioned on a *quo warranto* information, at the instance of a rate payer not a resident or voter in the ward. A person elected without the proper qualification might refuse to make the declaration from conscientious motives, or from a dread of the consequences temporally considered, and still decline to give up the office, for the only penalty attached to not making the declaration of qualification is the forfeiture of a sum not exceeding eighty dollars; and if, as in the present case, the person so neglecting were elected by acclamation, unless the remedy by information in the nature of a *quo warranto* is open, the duties of the office would remain undischarged for a whole year, and a ward might thus be unrepresented without any real default of the electors, who might know

nothing of the want or of qualification at the time of election, and the corporation would be without the full advice that under the law it is entitled to have. I would remark that the Municipal institutions Act does not in terms prohibit a resort to the remedy sought in this case, and the ordinary rule is that where a statute gives redress by a different mode from the common law or previous statutory method, without repealing the statute or prohibiting the common law proceeding, the remedies are cumulative—that is, either remedy may be resorted to.

There can be no question *Reg. ex rel. White v. Roach* and *Kelly v. Macarow*, on the facts presented were well decided. In the former the question had been disposed of in the manner provided by the Act, and the application for leave to file the *quo warranto* information was in effect seeking to have the question twice tried, and the party twice vexed. The discretion of the Court was therefore most justly exercised to prevent this; while in the latter the Court expressly refrained from affirming that in no case would leave be given, and upon the authorities the relator, Kelly, by being present at the election, having the right to nominate a candidate or to protest, and not doing so, precluded himself from taking the position of relator. There is undeniably great force and reason in holding parties to the easy and inexpensive remedy provided by the Municipal Institutions Act, where that remedy is only barred by their own neglect, but it seems to me it would rather frustrate than promote the object of 'the legislature in denying the common law remedy in cases where parties' interests are affected who never were within the remedy of the statute. The Legislature seems to have deemed a property qualification an essential, and while as to the mere question of the regularity of an election it might be most fitting that only those directly interested as voters or candidates should be permitted to question its regularity, it is an entirely different thing to say that an unqualified or disqualified person can by the will of a portion of the municipality be

put in a position to govern and make local laws for another portion that had no voice in the choice. I think, therefore, without binding myself to the view, that the cases of *Reg. ex rel. White v. Roach* and *Kelly v. Maccarow* are decisions not applicable to the circumstances of the present case, the rule may go on both grounds, that is, as to the original want of qualification at the time of the election, and not having made a sufficient declaration to warrant Dr. St. Jean retaining his office.

Upon the question of Dr. St. Jean in fact possessing the necessary property qualification I give no opinion, as it is impossible for me to determine the question on the material before me. Dr. St. Jean himself swears that he owns the west half of lot No. 20, on the south side of St. Patrick St., which is assessed at \$700, while the affidavit filed by Mr. Mosgrove in reply shews that he is assessed for lot No. 26, on the south side of Ottawa street, in the city of Ottawa, for the sum of \$700; flut but from the abstract of the title as it appears in the registry office it would seem that one W. A. Ross is the owner, as patentee of the lot, and to whom St. Jean seems to have given a mortgage, and would thus seem to have some interest, but what, on the evidence before me, I cannot determine. St. Jean does not aver in his affidavit that he is assessed for the west half of lot No. 20 on the south side of St. Patrick street, at \$700, but in paragraph No. 12, that the lot is assessed on the last revised assessment roll for that amount. There is much less care and precision observable in the preparation of pleadings and affidavits since the law has been so modified as to permit amendments where necessary, and the want of care and precision is very conspicuous in the present case.

I do not think the relator has, by laches, deprived himself of the right to the remedy sought. He seems to have come in the next Term after the election to the Court, and only one day late to move under the statute. This was sufficiently prompt, as no prejudice whatever can accrue by the delay to Dr. St. Jean.

Rule absolute.

REGINA EX REL. CLANCY V. CONWAY.

Alderman—License to sell liquor—Disqualification.

An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under sec. 74 of the Municipal Act from holding the office of alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Acts.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information, on the ground that the defendant illegally exercised the franchises of the office.

This was a similar application to that reported on page 77, made on the same day, by the same relator, and by the same counsel. In addition to the ground that the required declaration had not been subscribed were the following:—
2. That the said Conway was disqualified at the time of said election, because he was a shop-keeper and sold spirituous liquor by retail. 3. That he was a shop-keeper licensed to sell spirituous liquor by retail, and was so at the time of said election. 4. That he was proprietor of a shop licensed to sell liquor by retail, and was so at the time of said election. 5. That he had an interest in a contract of license to sell liquor with the corporation of the City of Ottawa.

The affidavit of the relator, on moving the rule, in addition to the absence of the statutory declaration, stated, as grounds of disqualification, that the said Conway was a shop-keeper who sold spirituous liquors by retail: that he was the proprietor of a shop in which spirituous liquor was sold by retail: that the license under which the liquor was sold was in the name of the said Conway's son, who was under age, and resided with his said father, who carried on the said business for his own use and benefit.

The case was argued, by the same counsel, on the same day as the previous application.

March 25, 1881.—CAMERON, J.—The objections to the defendant holding the office of Alderman for a ward in

the City of Ottawa, are, that he has not made the proper declaration of qualification required by law, and that he is disqualified by reason of his being a shop-keeper *licensed to sell liquor*, by reason of his in fact selling liquor under a license granted to his son.

By section 74 of the Municipal Institutions Act, R. S. O. Ch. 174, "no innkeeper or saloon-keeper, or shop-keeper, *licensed to sell spirituous liquors by retail*, and no person having by himself or his partner an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of any Municipal Corporation." The disqualification is not of a person selling liquor without a license, but of a "shop-keeper licensed to sell liquors by retail." Under the license to the son the father cannot lawfully sell his own liquors, and if he does he is amenable to the penalties enforced by law for selling without a license. The fact that there is collusion between the father and son, assuming that to be so, to enable the former to sell liquor without incurring the disabilities of a person licensed to do so, will not make the father a *licensed* shop-keeper, and I cannot hold him to be disqualified on that ground.

If, therefore, defendant makes before the proper officer a proper declaration of qualification within ten days, the rule will be discharged without costs, for the reasons assigned on this point in *re Clancy v. St. Jean*,* otherwise leave to file the information is granted, on the ground that without making the declaration of qualification he illegally exercises the franchises of the office. If in fact the defendant is acting in collusion with his son, I regret that I am forced to hold that he does not come within the prohibition of the statute, as it is disastrous to public morality when a person can by a trick or device evade the penalties imposed by the law. I don't think the son's license is such a contract as to disqualify the defendant, assuming him to have an interest therein.

Rule accordingly.

* *Ante* p. 77.

EASTER TERM, 44 VICTORIA, 1881.

From May 16th to June 4th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN DOUGLAS ARMOUR, J.

“ “ MATTHEW CROOKS CAMERON, J.

CROWE V. STEEPER AND WILLIAMS.

Cattle running at large—Impounding—Distress—By-law.

A by-law must be reasonably clear and unequivocal in its language in order to vary or alter the common law.

A municipal council by by-law, passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiffs' cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin,

Held, that as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O., ch. 195, for the damage done, irrespective of any question as to the height of the defendant's fences.

REPLEVIN for cattle. Plea 1, by Steeper, *non cepit*.

2. That he was poundkeeper of the township of Raleigh, appointed by the Municipal Council, and defendant Williams, within his district, distrained the cattle for unlawfully running at large, or trespassing and doing damage to his property, and delivered them to Steeper to be impounded: that Steeper received and impounded them and daily fed them, &c., and retained them for the purpose of disposing of them according to law, unless he should be paid his costs and charges: and that the plaintiff did not pay or offer such

charges or give security for the same. 3. Setting out a by-law of the township authorizing the impounding of any bull, cow or other cattle, distrained for unlawfully running at large, or trespassing and doing damage, delivered to him for that purpose by any distrainor, and directing a scale of charges for his fees and charges for keeping the same; and averring a distress damage feasant by Williams and impounding with defendant Steeper, and his claims for fees and charges which had never been paid or offered.

Pleas by defendant Williams: 1. *Non cepit*. 2. Distress damage feasant. Third and fourth pleas, similar to Steeper's second and third pleas.

Issue.

The case was tried at Chatham before Armour, J., without a jury.

The cattle—steers, heifers, and calves—it appeared, were running at large and got into defendant Williams's land from the high road. He impounded them with the defendant Steeper, the pound-keeper.

The learned judge found that the plaintiff's cattle were not breachy, having regard to the terms of the by-law with respect to lawful fences, and that the fence over which they got into the plaintiff's field was not a lawful fence. He reserved all legal questions for the Court, and entered a verdict for the plaintiff, with 1s. damages.

Nov. 17, 1880. *Bethune*, Q. C. obtained a rule *nisi* to enter a verdict for the defendant, on the ground that the cattle were distrained damage feasant and impounded, and that replevin would not lie after impounding, and there was no joint detention of the cattle by defendants after impounding.

February 11, 1881. *C. Robinson*, Q. C., and *Scane* shewed cause. The Common Law right of distress damage feasant is abrogated here by statute: *Ives v. Hitchcock*, Dra. Rs. 247; R. S. O., ch. 195, sec. 1, ch. 174, sec. 463; by-law of Raleigh, No. 302. At common law the distrainor must keep the distress in his own possession.

Where the matter has been taken up and provided for by municipal by-law and by statute, the common law is thereby abrogated, even if it be admitted that by the common law cattle were not allowed to run at large in this country, which is denied. By-law 302 designates what animals may run at large, and the provision that the pound-keeper shall impound any animal found running at large contrary to law, means contrary to the by-laws of the municipality. As to whether replevin will lie against both the distrainer and pound-keeper, goods in possession of A. cannot be replevied by writ against B. The goods here were in possession of both: *Gilbert on Replevin, Distrainer, and Pound-keeper*. The custom of allowing all cattle to run at large in common was established as early as 1794: 34 Geo. III., ch. 8. The defendants proved under the authority of the by-law, but failing on that fell back on the common law. The common law as to distress damage feasant, is not in force here: *Ives v. Hitchcock*, Dra. Rs. 259. Cattle may be replevied after being impounded: *George v. Chambers*, 11 M. & W. 158; R. S. O., ch. 195, secs. 3 and 13. Defendant Steeper, by his pleas, makes himself an actor in the suit, and cannot fall back on the defence that the goods were *custodiâ legis*: *Spry v. McKenzie*, 18 U. C. R. 191; *Haacke v. Marr*, 8 C. P. 441.

Bethune, Q. C., contra. A pound keeper is a public officer: *Harrison's Mun. Man.*, page 402, note *g*. Persons distraining at common law may impound, and a pound keeper appointed by a municipal council may receive distress made at common law. Ch. 195, R. S. O., does not change or abrogate the common law right of distress. There is no by-law in force in the township, as no by-law has been passed since the statute. The plaintiff made no offer to pay fees. The pound-keeper was obliged to receive these cattle, and is entitled to the protection of the Court: *Wardell v. Chisholm*, 9 C. P. 125. The goods were not repleviable against Williams, because he had not possession; and the action will not lie against both, because they are not jointly trespassers.

May 16, 1881. HAGARTY, C. J.—The question seems reduced to this.

Williams's fences were not of the height required by the local law. Plaintiff's cattle, not being breachy, got into Williams's land from the highroad, and he impounded them as damage feasant.

Plaintiff insists that his cattle were lawfully at large.

The by-law, passed 16th March, 1877, recites that it is necessary and expedient to make provision for restraining and regulating the running at large of certain descriptions of animals and to provide for impounding the same and causing them to be sold if not claimed, or in case of damages and expenses not being paid, &c., and for guidance of pound-keepers, fence-viewers and other resident persons, detaining animals trespassing contrary to the provisions thereafter provided, and for fixing, &c., the height of lawful fences, &c.

Sec. 1. That the following description of animals shall not be allowed to run at large in the township of Raleigh, viz.: horses, mares, colts, fillies, mules, asses, and swine, and all four-footed animals known to be breachy, &c., and all bulls over nine months old, rams over three months old, whether *bona fide* owned in Raleigh or not; provided that all cattle and sheep not owned by residents of Raleigh, or who rent or work lands therein, shall not be allowed to run at large in said township of Raleigh.

Sec. 2. * * the owner of any animal not permitted to run at large by this by-law shall be liable for any damage done by such animal, although the fence enclosing * * was not of the height required by the by-law.

Sec. 3 provides for the height of fences.

Sec. 4. All pound-keepers * * shall impound any horse, bull, ox, cow, sheep, pig, goat, or other cattle distrained for unlawfully running at large, or for trespassing and doing damage, delivered to him, &c., &c. * * *

Other sections provide for fees, &c., &c., and the proceedings by fence-viewers when damages are claimed, provided in all cases the fence shall be lawful against animals which are free commoners.

Sec. 14. Provides for an ox, cow, sheep, goat, or other cattle distrained for straying into premises, and the owner thereof keeping them instead of delivering them to the pound-keeper.

Sec. 463. Municipal Act (R. S. O. ch. 174) enables the council to pass by-laws providing pounds, and restraining and regulating the running at large or trespassing of any animals, and providing for impounding them and appraising damages, &c. &c.

Ch. 195, p. 1984, R. S. O. declares that until varied by by-law the owner of any animal not permitted to run at large by the by-laws of the municipality shall be liable for any damage done by such animal, although the fence enclosing the premises was not of the height required by such by-law.

Sec. 20. Provides for a case in which damages are claimed, and the fence-viewers are to be called in.

Sec. 21. If the fence was not of the lawful height, then they are so to certify to the pound-keeper, who, on payment of lawful fees, &c. shall deliver the animals to the owner, &c.

It appears to me that the whole case turns on the point whether by the by-law these cattle are allowed to run at large.

As a matter of opinion, I think it very likely that the township council thought by this by-law that they were so enacting. But they do not say so. They provide that other named animals shall not run at large, and they further declare that cattle not owned by residents of Raleigh shall not be allowed to run at large within the township.

I do not think that we can uphold this by-law as enacting that these cattle owned in Raleigh shall run at large.

If the municipality choose to exercise the powers given to them by the Legislature to regulate the running at large of cattle, they must do so in reasonably express terms, and not merely by implication.

By the common law, I think if these cattle stray from the highroad into the land of another and do damage there,

the owner is responsible therefor, irrespective of any question of fencing: See *Mason v. Morgan*, 24 U. C. R. 32. And by our own statute law already cited, R. S. O., ch. 195, it is pointedly declared that such is the law until varied by by-law.

When therefore the by-law is designed to alter or vary either common law or statutable rights, the language must be reasonable, clear, and unequivocal.

It can only be by a strained application of the maxim, "*Expressio unius est exclusio alterius*," that we can hold that a directing that a horse or a pig shall not be allowed to run at large necessarily allows any other animal so to do.

I find a case of *Jack v. Ontario and Simcoe R. W. Co.*, 14 U. C. R. 330, where the questions arise. A by-law of Innisfil provided the height of a lawful fence, and that any cattle from any other township should not be considered as free commoners, but should be liable to be impounded, and that all horses, bulls, and breachy cattle, and hogs under a certain weight, should not be allowed to run at large, and that the owner of any animal not permitted by the township regulations to run at large should be liable for damages done by it, notwithstanding the fences inclosing the premises might not be of lawful height.

The jury were told by the Chief Justice, Sir J. B. Robinson, that as the by-law did not affirmatively authorize cattle to run at large, but only negatively provided that certain animals and under certain circumstances should not run at large, the common law principle that all persons were bound to keep their cattle from trespassing upon others was in force and not abrogated.

The point is not further discussed in the argument in Term.

This is directly in point as regards the by-law before us.

I fully concur in the expression of opinion of the late very learned Chief Justice, and hold that the plaintiff's cattle were not allowed by law to be at large, and that he was liable for the damage done by them to Williams's premises, although the latter's fence was not of lawful height.

In this view of the law it is unnecessary to discuss the other questions raised on this argument, as to the liability of the pound-keeper in replevin, and the extent to which the common law is superseded by our municipal legislation.

I think the rule must be absolute to enter verdict for defendants.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

GRIFFIN V. MCKENZIE ET UX.

Chattel mortgage—Refiling.

The plaintiff held a chattel mortgage made by one G., which was dated 9th May, 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April, 1880, the plaintiff made affidavit of the amount due up to the 10th April, and refiled the mortgage under R. S. O. ch. 119, sec. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage.

Held, that the defendants were neither creditors nor subsequent purchasers or mortgagees within the statute, and therefore could not object to the mortgage because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year.

Semble, that such affidavit and statement should be made within the thirty days.

TROVER for a clover mill.

Pleas; 1. Traverse of property. 2. Not guilty, by statute.

Issue.

The case was tried at Brantford before Cameron, J., and a jury.

It appeared that, on the 9th May, 1879, Solomon Griffin, then a tenant of a farm belonging to the female defendant, mortgaged to his brother, the plaintiff, this clover mill and

other articles, with proviso for redemption on payment of \$200 and interest, in one year and one month from date, or sooner if the mortgagor chose, with other provisions.

There was a clause that the mortgagor would warrant and defend unto the mortgagee the said goods against everybody, and that he put him in full possession thereof by delivery of these presents. There were the usual printed conditions, &c., as to the mortgagee entering and taking the goods in certain specified contingencies. There was no redemise clause.

On the 2nd December following Solomon Griffin made another chattel mortgage to the female defendant of chattels and crops, including the clover mill, in consideration of \$300, redeemable 1st December, 1860.

Neither mortgage was impeached as to the consideration.

This clover mill was, as found on the evidence, illegally taken by defendants and placed on the premises leased by Mrs. McKenzie to Solomon Griffin. The distress was in November, 1880, before defendant's mortgage was in default. The distress being found to be illegal, defendants endeavoured to shew that plaintiff's mortgage was void as against them, on an objection that it had become void, not being properly renewed at the expiration of a year, and that the statement required by the Act to be filed with such renewal was not sworn to within thirty days next preceding the expiration of one year from the date of making and filing the mortgage.

The mortgage was dated 9th May, and filed 13th May, 1879, and was refiled on the 8th May, 1880, with an affidavit sworn to on the 12th April, 1880, and statement of the amount due up to the 10th of April.

There was a verdict for plaintiff.

May 19, 1881. *Hodgins*, Q.C., obtained a rule *nisi* for a new trial on this objection.

June 3, 1881. *Fitch* shewed cause. The 10th sec. of R.S.O. ch. 119 requires only the filing of the copy of the chattel mortgage and statement of the mortgagee's interest to be

within thirty days next preceding the expiration of the term of one year from the first filing thereof. There is nothing in the section to indicate that the affidavit verifying the statement must be sworn within the thirty days. The statement and affidavit must necessarily be made at some time prior to the filing, and therefore might not in any case exhibit the true interest of the mortgagee at the actual time of filing. The state of the account might be changed in one day as readily as in thirty-one, and therefore the affidavit and statement, no matter when prepared and sworn, must be taken for the purposes of the Act as speaking from the time of filing. It is no matter, therefore, when the affidavit is made: the mortgagee, by filing, makes it have reference to the date of filing. [HAGARTY, C.J.—Would perjury lie on such an affidavit as this, if the state of account had been changed after being sworn, but before filing.] Probably not; nor would it lie on an affidavit made two days before filing, even though the account in the interval had been changed. The defendants have no *locus standi* to dispute the validity of the plaintiff's mortgage. If not properly renewed it is invalid only as against creditors and subsequent purchasers, and mortgagees in good faith for valuable consideration. Creditors in this section must mean either execution creditors or creditors seeking to enforce their claims against the goods under some process of law. The defendants were not, therefore, creditors within the meaning of the section. Upon removing the clover mill on the demised premises for the purpose of distraining it they became wrong-doers. They are not subsequent mortgagees. Plaintiff's mortgage was filed on the 13th May and theirs on the 29th December following; and plaintiff's did not, as against theirs, require to be renewed. He cited *Hodgins v. Johnston*, 5 App. R. 449.

Hodgins, Q.C., contra. The statement made up to the 10th April and the affidavit sworn on the 12th April, 1880, are not within the thirty days next before the expiration of the year from the filing (13th April, 1879,) of the

plaintiff's chattel mortgage. If earlier than the thirty days, the statement and affidavit might be made and sworn at or immediately after the original filing. The statement should refer to the date of the filing: *Fraser v. Bank of Toronto*, 19 U. C. R. 381; and is intended to give creditors, at the end of the year, information as to the state of the debt secured: *Kissock v. Jarvis*, 9 C. P. 156. The statement and affidavit are one instrument: *Barber v. Maughan*, 42 U. C. R. 134; *Sloan v. Maughan*, 3 App. Rs. 222. Subsequent creditors, in the Act, means those who have acquired rights which might be defrauded: *Kohl v. Lynn*, 34 Mich. 360. Our Chattel Mortgage Act is copied from New York, and there such a mortgage would be void as against creditors, prior or subsequent, though they had not recovered judgments: *Dutcher v. Swartwood*, 22 N. Y. S. C. (Hun.) 31. A landlord is a creditor and may, without a judgment, have a fraudulent conveyance of chattels set aside when it obstructs his right of distress: *Allen v. Camp*, 1 Monroe (Ky.) 232. A simple contract creditor may apply to set aside a fraudulent conveyance: *Longeway v. Mitchell*, 17 Gr. 190. The term "subsequent purchaser or mortgagee" is also found in R. S. O. ch. 111, sec. 74, and has received judicial interpretation in cases under the Registry Acts: *Bruyere v. Knox*, 8 C. P. 520; *McMaster v. Phipps*, 5 Gr. 258; *Hodgins v. Johnston* differs from them and *Boynton v. Boyd*, 12 C. P. 334, and its effect is to preclude creditors of a mortgagor, who become such during the first year's currency of a chattel mortgage, from impeaching for any cause any re-filing of such mortgage.

June 25, 1881. HAGARTY, C.J.—It was urged for plaintiff: 1. That his mortgage was properly re-filed. 2. That, even if not, the defendant could not object, as the statute as to re-filing would not apply in her favour.

The defendant's mortgage was taken in December, 1879, five months before the year expired from the date of plaintiff's mortgage, 9th May, 1879. The latter was filed 13th May, 1879.

On the 12th April, 1880, plaintiff made affidavit with statement of the amount due on the mortgage, including interest up to 10th April. It was re-filed 8th May, 1880. The statute (R. S. O. ch. 119, sec. 10) directs that it shall be void after the expiration of one year from the filing, unless, within thirty days next preceding the expiration of said term of one year, a true copy, &c., with statement shewing the interest of the mortgagee, and a full statement of the amount still due for principal and interest and of all payments, &c., is again filed, with an affidavit of the mortgagee stating that such statements are true and the mortgage not kept fraudulently on foot, &c.

The renewal was filed within the thirty days, but the affidavit verifying the statement was sworn 12th April, more than thirty days before the expiration of the year, and therefore the statement of account did not shew truly how much was due within the prescribed time.

There was no pretence that there was any change in the amount due. The objection is wholly technical, and such a state of facts may never again occur, and it does not seem necessary that we should decide the case upon it.

We would strongly advise parties renewing to make the statement and affidavit within the thirty days. They will thus more clearly meet the words of the statute, as shewing the amount *still* due.

The case in appeal (*Hodgins v. Johnston*, 5 App. 449) is precisely in point, to the effect that where the defendant's mortgage was taken long before the expiration of the first year from the filing of plaintiff's mortgage, he could not object to the latter not being duly re-filed: that he was not a subsequent purchaser or mortgagee within the meaning of the statute: that when he became mortgagee the defendant's mortgage was valid and subsisting: that the subsequent purchasers and mortgagees were those who acquired rights after the expiration of a year from the time of filing, and who were therefore entitled to regard the mortgage as no longer in existence, if not properly re-filed.

ARMOUR, J.—I agree that the rule should be discharged, but on this ground only—that the defendants were not at liberty, under the circumstances, to take the objections they took to the plaintiff's mortgage. I do not assent, for I think it unnecessary either to assent to or dissent from it in this case, to the doctrine laid down in *Hodgins v. Johnston*, nor to its applicability, if I did assent to it, to the case in hand.

CAMERON, J., concurred.

Rule discharged.

REGINA EX REL. CLANCY V. McINTOSH.

Contested election—Acceptance of office—Qualification.

The acceptance of office by a mayor elect, referred to in R. S. O. ch. 174, sec. 180, within a month from which a writ of *quo warranto* to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification and office, and not a mere verbal acceptance by speech to the electors, or such like.

Linton v. Jackson, 2 Cham. R. 18, dissented from.

The defendant was not assessed for the year 1880, but in that year was assessed, on the 3rd September, for the year 1881, upon unincumbered leasehold property of the value of \$4,100. By by-law of the city of Ottawa this assessment was revised before the 15th November and returned before the 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected mayor of Ottawa on the 3rd January, 1881.

Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised assessment at that time, within the meaning of the by-law and R. S. O. ch. 180, sec. 44, and the defendant could not qualify thereon.

ON the 16th of February, 1881, a writ of summons, in the nature of a *quo warranto*, under the Municipal Institutions Act, was issued, upon the relation of John Clancy, to try by what authority Charles H. McIntosh claimed to use, exercise, and enjoy the office of mayor of the city of Ottawa.

The statement and relation of the relator filed shewed that the said Charles H. McIntosh claimed to hold the said office under pretence of an election held on the 3rd day of January, 1881: that the relator was interested in the election as a voter who gave his vote thereat, but not for the said McIntosh: that the said McIntosh was not duly qualified to be elected mayor, as he had not, at the time of his election, in his own right, or in right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable estate, rated in his own name on the last revised assessment roll of the city of Ottawa, to at least the value, of freehold, of \$1,500, or leasehold, of \$3,000, over and above all charges, liens, and encumbrances affecting the same.

The affidavit of the relator shewed that the respondent, on the 17th January, 1881, made a declaration of qualification as follows: "I, Charles H. McIntosh, do solemnly declare that I am a natural born subject of Her Majesty: that I am truly and *bonâ fide* seised and possessed to my own use and benefit of such an estate, to wit, a leasehold property for four years, consisting of part of the west half of lot No. 22, on the south side of Sparks street, in the city of Ottawa, and assessed at the sum of \$4,100, as doth qualify me to act in the office of alderman for the city of Ottawa, according to the true intent and meaning of the municipal laws of Upper Canada:" that the said McIntosh was not, nor was he at the time of the said election, assessed in his own name on the last revised assessment roll for the said city of Ottawa, for the said leasehold property, consisting of part of the west half of lot number twenty-two, on the south side of Sparks street, aforesaid.

The respondent, by his affidavit, sworn on the 1st day of March, 1881, set forth, among other things, that he was elected on the 3rd day of January, 1881: that on the evening of the day the result of the election was made known, and he, respondent, in the presence of the electors at the city hall, declared publicly that he accepted the office

of mayor for the year 1881, and in a speech then delivered thanked the electors for their confidence in re-electing him : that on the 5th day of January, there was a formal declaration of his election made by the city clerk in the city hall, at which a large number of the electors were present, and at the said declaration he again publicly declared in presence of the city clerk and electors that he accepted the office : that his said first acceptance of office was published in the *Ottawa Citizen* and *Free Press* newspapers, published in the said city of Ottawa on the 4th day of January; and his second acceptance was published in the issues of these papers of the 5th and 6th days of January : that in or about the month of May, 1880, he leased, for the term of four years, the south part of lot 22, on the south side of Sparks street, containing 24 feet frontage by 26 feet in depth, with the buildings thereon, from one John Henry, the owner thereof, for the yearly sum of \$450, and had since occupied the same as his printing establishment and offices, and that he had not parted with or encumbered the same in any way : that the said property was assessed on the last revised assessment roll of the city : that in pursuance of the statute in that behalf, the Council of the city of Ottawa passed a by-law (verifying a copy of it), under which the assessment for the year 1881 was made, on the 3rd day of September, 1880, and by the said assessment he was assessed for the said property for \$4,100, and there was no appeal from the said assessment to the Court of Revision or the County Judge : that all the appeals to the Court of Revision and County Court Judge were disposed of before the 27th day of December last, and before the said election took place.

The by-law referred to in the respondent's affidavit was by-law No. 435, entitled a by-law in relation to the time for taking the assessment for the year 1878, and subsequent years, which recited, "Whereas, by an Act of the Legislature of Ontario, chaptered 180 of the Revised Statutes of Ontario, and entitled an Act respecting the assessment of property, it is enacted that in cities the

council may pass by-laws for regulating the periods for taking the assessment, and for the revision of the rolls by the Court of Revision, and by the County Judge, as hereinafter mentioned;" and then proceeded as follows: "Wherefore the Corporation of the Council of the city of Ottawa enacts as follows :

1. During the present year, in addition to the regular current assessment made therefor during the ordinary and accustomed periods, an additional assessment shall be taken between the 1st day of July and the 30th day of September; the roll for the same to be returned to the city clerk on the 1st day of October, and the said clerk shall regulate all notices of appeal, and the sittings of the Court of Revision, and for hearing of appeals by the County Judge, on the said last made assessment, by the same measure of time as is required by law for an ordinary assessment, so that the said Court of Revision shall close on the 15th day of November, and the final return by the County Judge on the 31st day of December.

2. The assessment so to be made and revised between the 1st day of July and the 31st day of December, 1878, shall be so made and revised as and for the assessment for the year 1879, on which the rate of taxation for the year 1879 shall be struck and levied.

3. In subsequent years, and until otherwise enacted by the council, the assessment and revision of the same shall continue to be made between the periods mentioned in sec. 1, and be so made and revised as and for the assessment for the year immediately following, on which the rate of taxation in the said following year shall be struck and levied."

The assessment of the respondent was on the roll made in 1880 for the year 1881, and he was not rated or assessed on the roll for the year 1880.

The *quo warranto* summons came on to be heard before the learned Clerk of the Crown in Chambers, and on the 10th day of March, 1881, he gave judgment in favour of the respondent, on the ground that the writ had not been issued within one month after the respondent had accepted

office in the manner above mentioned, basing his decision upon the opinion of the late Chief Justice Draper in *Reg. ex rel. Linton v. Jackson*, 2 Cham. R. 18. The question of qualification was left undecided. From this judgment the relator appealed and obtained from the Chief Justice of this Court a summons by way of Appeal on the 15th March, 1881, returnable in Chambers. On this summons, after several enlargements, coming on to be heard before the said Chief Justice, at his instance, and by consent and agreement of the counsel for both parties, the motion was referred to the full Court.

On the 26th of May, *Ogden* moved the summons absolute.

Aylesworth showed cause, contending that the writ issued on the 16th of February was too late, as being more than six weeks after the election, and four after the acceptance of office by the respondent, the acceptance being his declaration, after the close of the poll on the 3rd of January, that he did accept the office, and his further declaration to the same effect when the official result of the election was declared on the 5th January. That the decision of Draper C. J., in the case of *Reg. ex rel. Linton v. Jackson* was an express decision decisive of the question and in accordance with the language of the Municipal Institutions Act, and at all events the respondent was qualified, as he was rated on the roll for the proper amount at the time of the election, whether that was to be considered as being held on the 27th December, 1880, and continued to the 3rd January, or held on the latter day only, as the roll on which he so appeared to be rated was in fact the last revised assessment roll for the city of Ottawa.

Ogden supported his summons, and contended that the acceptance of office intended by the Legislature in limiting the time for moving was the formal acceptance required by the statute, by making the statutory declaration of office, without which the respondent could not enter upon the duties of the office or take his seat; and

until he did this there was no binding acceptance of office by him, and the Legislature intended to give to any one qualified to do so the right to dispute the validity of an election for one month after such actual and formal acceptance : that the case of *Reg. ex rel. Linton v. Jackson* was not well decided ; and as to the qualification, which had not been previously argued or decided, he contended the roll on which the respondent appeared had nothing to do with the year 1880 at all : that it had no effect, by the very terms of the by-law, till the year 1881, and as the election was clearly begun on the nomination day, which was in the year 1880, the roll of the year 1881 could not be the last revised roll for the year 1880.

June 25, 1881. CAMERON, J.—As to the first question, by sec. 180, ch. 174, R. S. O., it is enacted : “ If within six weeks after the election, or one month after acceptance of office by the person elected, the relator shews by affidavit to a Judge reasonable grounds for supposing the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected * * the Judge shall direct a writ of summons, in the nature of a *quo warranto*, to be issued to try the matters contested.”

By sec. 265 of the Act it is declared ; “ Every person elected or appointed under this Act to any office requiring a qualification of property in the incumbent shall, before he takes the declaration of office, or enters on his duties, make and subscribe a solemn declaration to the effect,” &c.

By sec. 268 the declaration of office and qualification may be made “ before some Court, Judge, Police Magistrate, or other Justice of the Peace, having jurisdiction in the municipality, or before the Clerk of the municipality ; and the Court, Judge, or other persons, before whom such declarations are made, shall give the necessary certificate of the same having been duly made and subscribed.” And by section 156 “ the person or persons elected shall make the necessary declarations of office and qualification, and assume office accordingly.”

Under these provisions there would seem to be scarcely room for doubt that the acceptance of office referred to in section 180 is the formal and complete acceptance, by making the declarations of qualification and office, were it not for the opinion of the late very learned and distinguished Chief Justice Draper, in *Reg. ex rel. Linton v. Jackson*, referred to on the argument; but with all due respect for every opinion of that able Judge, it would seem to accord with the spirit and intention of the Legislature to require the acceptance of office, from which the time for disputing the right of any one elected to the office of mayor or member of a municipal council, should be computed, should be certain and definite, and not left to the mere statement of the candidate; and as the time fixed by law for holding the first meeting of the council is just about six weeks after the election, it can hardly be supposed the Legislature, by giving the alternative, "or four weeks after the acceptance of office," intended to shorten the time of moving where within the six weeks there had been an actual acceptance of office by making the requisite declarations of qualification and office; but rather it must be intended that six weeks was a definite limit within which the right to question an election existed under all circumstances, but which time might be extended, by the act of the person elected, in delaying to accept the office, for four weeks beyond the date of such acceptance.

This was the opinion of the Court of Common Pleas, as expressed by Chief Justice Macaulay, in *Regina ex rel. Rosebush v. Parker*, 2 C. P. 15, wherein he said, "I think that in the computation of six weeks the day of the election is to be excluded. * * I have, in a case before me in Chambers, expressed my opinion already, that six weeks, at all events, is allowed to impeach an election, although the office may have been accepted more than a month; but that if the application be not made *within six weeks*, then the test is, whether the office has been accepted more *than a month previously*."

It was urged by Mr. Aylesworth that as, by sec. 215 of

the Act, the members of every Municipal Council shall hold their first meeting at eleven of the o'clock on the third Monday of the same January on which they are elected, and by sec. 216 no business shall be proceeded with at such meeting until the declarations of office and qualification have been administered to all the members who present themselves to take the same, the declarations could not be administered before such meeting, and so the acceptance of office referred to must be no more than an actual assent to his election; but this contention is not well founded, as by sec. 156, which follows the provision for the official declaration of the result of the election, it is declared the person or persons elected shall make the necessary declarations of office and qualification and assume office accordingly; and sec. 268 authorizes the Court and persons above mentioned to administer the oath. It is true these sections do not prescribe a time for making the declaration, but read with section 272, which imposes a penalty for refusing an office, or failing to make the declarations of office and qualification for twenty days after the person elected knows of his election, shows that these declarations may be made at any time after the formal declaration of the result of the election. It will be observed, too, that the penalty is only imposed upon qualified persons, and an unqualified one would not be required to accept an office to which he may be elected, which is a further indication that the acceptance of office referred to is the formal one.

Upon the question of qualification also the contention of the relator must prevail. It is clear from the by-law that the assessment made in 1880 has no relation whatever to the status of voters or candidates for the year 1880. It was an assessment to take effect in the year 1881, and not before, and as there is no doubt the nomination was the commencement of the election it cannot be deemed the last revised assessment roll on which the qualification of a candidate at that election could appear. The revised roll is that upon which the rates are struck and the financial

operations of the municipalities are based, and the roll adopted and revised in 1879, was that on which the candidates in the year 1880, by the terms of the by-law and the effect to be given thereto, under section 44 of the Assessment Act, ch. 180, R. S. O., should appear to be qualified. If a different construction were to prevail, the qualified electors would be found in one roll and the candidates in another, which would be at variance with the municipal scheme, which clearly before the modification of the assessment law in respect to cities and towns, made by the above section 44, was, that electors and candidates should be qualified according to the same roll.

It is to be regretted that where, as in this case, the respondent at the time of the election had the requisite property qualification, if it had been on the proper roll, he should be put to the trouble and expense of another election if he wishes to hold the office, and also have to bear the costs of his defence of the seat, for he cannot reasonably be relieved from costs, having failed to make good his right to the office. The relator has maintained his position, and is therefore entitled to his costs, which the respondent might possibly have avoided by disclaiming in due time.

HAGARTY, C. J., and ARMOUR, J., concurred.

Judgment accordingly.

DREW V. THE CORPORATION OF THE TOWNSHIP OF
EAST WHITBY.*Negligence—Injury by fellow servant.*

The plaintiff being engaged in the service of the defendants in repairing a bridge was injured by the fall of the hammer of a pile-driver, caused, as was found, by the negligence of one M. The work was being performed in R.'s section, R. being a councillor, and M., who was the reeve of the municipality, was employed at day wages by R. as foreman. *Held*, that M., though reeve, was not acting in that capacity, but as a hired fellow servant with the plaintiff: that there was nothing to so identify the defendants with him in the work, as their chief officer, as to take the case out of the ordinary rule governing the relation of fellow servants; and that the plaintiff therefore could not recover.

THE first count of the declaration stated that defendants so unskillfully, &c., worked and managed a pile-driving machine owned by them, then used in their work, that the ram, or hammer, fell and injured the plaintiff.

Second count. That the defendants were a municipal corporation, and that a bridge which it was their duty to repair, was out of repair, and defendants engaged plaintiff to work at the repairs, at which work the defendants so negligently managed the machine that the plaintiff was injured.

Third count. That defendants, by their agent, acting within the scope of his agency, and under authority from them, assaulted plaintiff, and struck him, to his injury, with the hammer of a pile-driving machine, &c., &c.

Pleas: 1. Not guilty.

2. That the grievances were committed by servants of defendants, and solely by their negligence and without defendants' authority or sanction, and at the time when the servants were repairing said bridge, and said servants were reasonably fit and competent therefor, &c., and plaintiff at said time was also a servant engaged in defendants' service and acting with defendants' other servants in repairing such bridge.

3rd, to 3rd count. That the injury was caused by plaintiff's own neglect.

The trial was before Galt, J., and a jury, at Whitby.

The Council had been petitioned to repair this bridge. The plaintiff's case was that Mothersill, the reeve, hired him and some others to work at it : that they had a derrick and pile-driver : that the reeve acted as foreman and directed the work : that the plaintiff was digging out a place for a pile, and while doing so he was struck senseless by a blow from the hammer, and seriously injured : that the reeve forgot he was below and gave orders to raise the hammer, and it came down, striking the plaintiff, who was below.

The reeve's son was also working, and Farewell (a witness) saw the reeve handing a piece of timber to his son to block the hammer as it rose at the second landing, but it fell before it quite rose to that landing. He supposed it was the hammer coming in contact with the trip that caused the accident ; and he had heard the reeve's son, the day before, cautioning his father about having the trip too low. He said it was the son's duty to block the hammer.

For the defence it was shewn that this bridge was in the section called "Ross's section." Ross was one of the council. Ross spoke to the reeve to get one Wheeler to do the work. Wheeler could not go ; then Ross applied to one Northup, and could not get him. Then he applied to the reeve to get him to do it. The reeve understood something about pile-driving. He told Ross he could not do it without pay, and that defendants might as well pay him as any one else, and on this understanding he went to work, hiring the plaintiff, his son George, and two others. He stated that he thought the plaintiff was away from below when they raised the hammer.

An account was made out by the clerk of the expenses, and as the reeve did not like his name to appear in the account the amount of his pay was put into a bill under the name of another son of his, "Fenwick Mothersill," who was not at the work. The amount in all was \$55.25, which Ross drew and paid to the reeve, who paid the men, including his own pay, \$6.75. It was stated that the order to

raise the hammer was given in a loud voice that the plaintiff might have heard.

The clerk of the council said there was no minute of council about this work : that it was in Ross's section, and he hesitated about undertaking it, and spoke to the reeve.

A nonsuit was moved for, on the ground that the accident occurred in the joint employment of the parties as fellow-servants. It was overruled, with leave to move.

The learned Judge told the jury that if, in their opinion, this was a pure accident, the plaintiff was not entitled to recover, as when persons were engaged in a joint occupation they take upon themselves the risk of carelessness on the part of a fellow-servant. He also told them that if in their opinion the injury to the plaintiff was occasioned by negligence on his own part he was not entitled to recover.

A verdict of \$300 was found for the plaintiff.

May 17, 1881. *Ritchie* obtained a rule *nisi* to enter a nonsuit on the law and evidence, on the grounds : that the relation of master and servant existed between the plaintiff and defendants, and the plaintiff had equal knowledge with them of the risks, and that the injury received was a risk plaintiff voluntarily ran ; and that the injuries were caused by the neglect of a fellow-servant.

May 31, 1881. *J. K. Kerr*, Q.C., shewed cause. The evidence shews that the injury was occasioned by the negligence of Mothersill, the reeve, and it is submitted that the negligence of the reeve, whose duty it was by statute to superintend the work, must be held to be the negligence of defendants ; and that the reeve, from his superior position, cannot be regarded as a fellow servant with the plaintiff. It is true that a servant assumes the risk of negligence of a fellow servant ; but where the injury results from the personal negligence of the master, the latter is liable, and cannot escape responsibility by shewing that he was working as an ordinary workman with the servant injured ; *Ashworth v. Stanwix*, 3 E. & E. 701, is in point, and should govern here. A corporation can only act by

superintending officers, and the negligence of those officers in respect to other servants is the negligence of the corporation. In this case, the reeve was not an ordinary servant, but was the representative of the corporation in respect of the work in question, and the corporation is therefore liable for his negligence. See American cases as to liability of corporations for neglect of officers referred to in *Wharton on Negligence*.

Ritchie, contra. Even admitting that the injury resulted from the personal negligence of the reeve, the defendant cannot be held liable, because the reeve was acting as a fellow servant, and was not in any way performing duties imposed on him by statute, as the head of the corporation. The evidence shews that the reeve was employed to superintend the work in question solely on account of his experience in connection with pile-driving machines; and, further, that he only consented to undertake such work on the express stipulation that he should be paid for his services. The mere fact that the reeve acted as foreman, and occupied a position superior to plaintiff and the other workmen, cannot make any difference as regards defendant's liability. It has been expressly held that a foreman is a fellow servant, and that the negligence of the vice-principal, or representative of the master, will not make the latter liable to other servants engaged in the same common employment; *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Feltham v. England*, L. R. 2 Q. B. 33; *Howells v. Steel Co.*, L. R. 10 Q. B. 62. The general rule is, that a master is not liable to a servant for an injury arising from the negligence of a fellow servant in the course of their common employment; and the cases just referred to shew that the mere superiority of the position, as between the servants themselves, does not prevent the application of the rule. The only remaining question therefore is, does the fact that defendants are a corporation, and can only act through officers, make any difference? It is true that in some of the American States, it has been held that the rule as to non-liability of masters in such cases does not apply to

corporations; but the contrary has been expressly decided in England. See remarks of Judges during the argument of *Howells v. Steel Co.*, *supra*. *Wilson v. Hume*, 30 C. P. 542. However, the American cases on this point are not uniform, and it is submitted that there is no good reason why corporations should be excepted from the rule, since the superintending officers are usually men of means, and it is much more reasonable to hold such officers personally responsible for their own negligence, than to impose liability on the corporation for their acts in respect of fellow servants.

June 25, 1981. HAGARTY, C. J.—The only question discussed on the argument was, whether this case could be taken out of the acknowledged rule as to injuries sustained in a common employment.

Mr. Kerr, in his able argument, urged that we must consider the defendants as acting through their reeve, and that they are so identified with him that his neglect is their neglect, and brings the case within the principle of *Ashworth v. Stanwix*, 3 E. & E. 701. It was there held that when the master himself took part in the servant's work, and while so doing injures the servant by his negligence, he is liable.

The Court say: "Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculations of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command."

It seems clearly established that the superior rank or position of a foreman or manager does not affect his position of a fellow-servant in a common employment with one of far inferior grade: *Wilson v. Merry*, L. R. 1 Sc. Ap. 326; *Feltham v. England*, L. R. 2 Q. B. 33.

No question appears to have been raised in this case as to the employment or hiring of reasonably competent persons to do this work, or of any liability arising from defective machinery or anything else within the duty or knowledge of the defendants.

The Municipal Act, sec. 236, declares that the head of the council shall be the chief executive officer of the corporation, and it shall be his duty to be vigilant and active in causing the municipal law to be duly executed, to inspect the conduct of subordinate officers, &c., &c., and to recommend measures for the improvement, &c., health, security, comfort, &c., of the municipality.

The defendants are bound to repair roads and bridges.

Sec. 410 avoids all contracts of any kind, or purchase or sale, in which the corporation is interested, entered into by any member of the council.

If in this case the council had sent an engineer or other paid officer to do this work, and either by his directions, or by his unskilfulness in aiding or assisting in it himself, a workman was injured, I do not see how the latter could have any claim for compensation against the defendants, apart from any question as to not employing reasonably competent persons. If a person had contracted with them to do the work they would in like manner not be responsible for his injuring one of his fellow workmen.

In the present case we can hardly understand that the reeve can be considered as representing the defendants in the doing of this work in the sense of an individual defendant joining in the doing of his own work, as in *Ashworth v. Stanwix*, 3 E. & E. 701. There would seem to be no privity between them as to its execution.

It would properly be in Ross's section, and if Ross, in the ordinary course of business, had hired and superintended the men it would be a step nearer the doctrine contended for by the plaintiff. But it is arranged apparently between him and the reeve that the latter will go and do it, receiving pay as an ordinary workman, certainly not, as we should understand, as the head of the municipality exer-

cising his statutable superintendence of their duties and business.

Is there any reason for supposing that he would have undertaken the doing of this piece of work in Ross's section except as a workman to be paid for his work?

However improper it may be said to be, that the head of a municipality should, without its knowledge, work as a day labourer on a corporation work and draw pay as such, it seems clear that this gentleman thought proper so to do. We do not see how we can regard him in any other light. His negligence or those of the men under his direction might make the corporation liable to others; as for example, in leaving obstructions on the highway, &c., because the act is done in the execution of one of their duties, and they must be responsible; but such a liability falls short of their being answerable for an injury done by one workman to his fellow.

We are not called on to discuss any question of personal liability of Mothersill to this plaintiff. It is sufficient for us to say that we do not see how to take this case out of the ordinary rules governing the relation of master and servant.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute.

LAING ET AL V. ONTARIO LOAN AND SAVINGS COMPANY.

*Growing crops, mortgage of—Mortgage of land—Distress clause—
Right of mortgagee to distrain.*

A mortgage of land contained no attornment clause, and no provision expressly creating the relationship of landlord and tenant between the mortgagor and mortgagee, but it provided for possession by the mortgagor until default; that on default in payment of any one instalment for two months all should become due, and that on default in payment of any instalment the mortgagees might distrain therefor, and by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The first instalment fell due on the 1st November, 1879, and the mortgagees being in possession the mortgagees distrained therefor on the 6th October, 1880.

Held, that this right to distrain was a mere license, and did not warrant the taking of a stranger's goods upon the premises.

Semble, per CAMERON, J., that the mortgagors, on default, ceased to hold as tenants, and the distress therefore was illegal, as having been made more than six months after their term had expired.

The goods distrained were crops produced from the land after the 1st November, 1879, and the plaintiffs claimed them under a chattel mortgage, given on 31st May, 1880, of such crops, which had then been just sown: *Held*, that the growing crops passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants.

THE declaration was in trover, trespass, and detinue, for the seizure, conversion, and detention of the plaintiffs goods, that is to say, 840 bushels of oats, 87 bushels of peas, one and a-half acres of potatoes, one and a-half acres of corn, three tons of hay, a threshing machine and horse power, one sideboard, seven chairs, and one organ.

The defendants pleaded: (1.) Not guilty. (2.) That the goods were not the plaintiffs. (3.) That defendants did not wrongfully deprive the plaintiffs of the use and possession of the goods, or any of them. (4.) That plaintiffs never were possessed of the goods, or any of them. They also pleaded *non detinet*, and the following special plea: "That before the alleged conversion, and before the making of the mortgage hereinafter mentioned, one Mary Ann Bentley was the owner of certain lands and premises, and was in possession thereof, and the said Mary Ann Bentley and John Bentley, her husband, on or about the 18th November, 1878, being then in possession thereof, executed to the

defendants a mortgage in fee, in pursuance of the Act respecting short forms of mortgages, of the west half of lot No. 1, in the 5th concession of the township of Reach, excepting thereout an estate, for the life of Mrs. Mary Ann Simson, in half an acre on the north end thereof, subject to a proviso for redemption on payment of fifteen annual instalments, of \$350 each, on the first day of November in each year, during the term of fifteen years, the first of such instalments to be paid on the 1st November, 1879, and on payment of all other payments in respect of certain shares in the said mortgage mentioned, subscribed by the said Mary Ann Bentley in the defendants' company, and on payment of all fines and forfeitures imposed upon the said mortgagors, &c. * * And in and by the said mortgage the said Mary Ann Bentley and John Bentley covenanted with the defendants in the words following: 'The mortgagors covenant with the mortgagees that they will pay the mortgage money and interest and charges by the said instalments, and the said fines and forfeitures, if any, and observe the said proviso. * * Provided that, on default of payment for two months of any of the said instalments, the whole of the remaining instalments shall become payable, and if the said mortgagors shall make default in payment of any of the said instalments, or of any part thereof, at any of the days or times limited for payment, it shall and may be lawful for the said mortgagees, or their successors, to distrain therefor, or any part thereof, and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises, so much of any such instalments as shall from time to time be or remain in arrear and unpaid; and provided that until default of payment the mortgagors shall have quiet possession of the said land.' And the said Mary Ann Bentley and John Bentley, in pursuance of the last mentioned proviso, entered and were possessed of the said lands and premises, and had held and used, and continued to have held and used the same until and after the said alleged taking, detention, and conver-

sion; and the said Mary Ann Bentley and John Bentley made default in payment of one of the said instalments, being the instalment payable on the 1st November, 1878; and the defendants did not enter into possession of the said lands and premises by reason of the said default, but permitted the said Mary Ann Bentley and John Bentley to continue to have hold, use, and occupy the same as their tenants; as aforesaid, and at the time of the alleged taking and conversion, and while the said Mary Ann Bentley and John Bentley continued to hold, occupy, and possess the said lands and premises as tenants as aforesaid, and during the continuance of the said term, a large sum was due under the said mortgage, being the first instalment, and was in arrear and unpaid and owing from the said Mary Ann Bentley and John Bentley to the defendants, wherefore the defendants well avow the taking of the said goods upon the said premises, and justly, as a distress for the said instalments and rent, which still remain due and unpaid."

The plaintiffs joined issue on these pleas.

The case was tried at Whitby, before Galt, J., and a jury.

Upon the trial it appeared that the plaintiffs claimed the goods and crops mentioned in the declaration under two several chattel mortgages made by the said Mary Ann Bentley and John Bentley to them, and dated respectively the 24th October, 1879, and 31st May, 1880. The first mortgage was made to secure the payment to the plaintiff of \$251.44, on the 1st October, 1880, and the second to secure the payment of the sum of \$330.20, on the 15th day of October, 1880, which latter sum included the former. The first mortgage covered the chattels mentioned in the declaration other than the oats and peas and the growing crops, and the second mortgage described the property mortgaged as follows: "All and singular the goods and chattels and growing crops hereinafter particularly mentioned and described; that is to say, six acres of peas, fifty-four acres of oats, seven acres of timothy meadow, one acre of potatoes, one acre of turnips, and three-quarter

acre of corn; all which said goods and chattels and growing crops are now lying and being and growing on the premises, situate on lot number one, in the fifth concession of the township of Reach." The mortgages contained no direct permission to the mortgagors to remain in possession, but contained the following provision: "And also in case default shall be made in the payment of the said sum of money in the said proviso mentioned, or of the interest thereon, or any part thereof; or in case the mortgagees shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels, or any of them, or to remove the same, or any part thereof, out of the county of Ontario, or suffer or permit the same to be seized, or taken in execution without the consent of the mortgagees * * to such sale, removal, or disposal thereof, first had and obtained in writing—then and in such case it it shall and may be lawful for the mortgagees * * at any time during the day to enter into and upon any lands, tenements, houses, and premises, wheresoever and whatsoever, where the said goods and chattels, or any part thereof, may be, and to break and force open any locks * * for the purpose of taking possession of and removing the said goods and chattels." The mortgages also contained this provision: "And the mortgagors do put the mortgagees in the full possession of the said goods and chattels by delivering to them these presents in the name of all the said goods and chattels at the sealing and delivery hereof." The mortgages were duly filed in the office of the clerk of the County Court.

The defendants, by warrant under their corporate seal and the hand of D. H. McMillan, president, dated 6th October, 1880, authorized George Gurley, their bailiff, to distrain the goods and chattels liable to be distrained for rent in and upon the west half of lot number one, in the fifth concession of the township of Reach, in the county of Ontario, then lately in the tenure or occupation of John Bentley and Mary Ann, his wife, or one of them, for the sum of \$350, being the amount of one instalment, payable to the said company as rent, on the 1st November, 1879,

under an indenture of mortgage, dated on or about the 15th November, 1878, made by the said John Bentley and Mary Ann Bentley, his wife, to the said company, and comprising the said land, and proceed thereupon for the recovery of the said money as the law directs in case of rent reserved upon a demise, and for their so doing such should be their sufficient warrant..

On the 6th October, 1880, George Gurley seized under this warrant and gave notice in writing, dated the 11th October, 1880, that he would sell on the 16th October, the goods and chattels distrained, describing them as follows: "A quantity of oats in the barn not threshed, a quantity of peas in the barn not threshed, $1\frac{1}{2}$ acres of potatoes in the field, $1\frac{1}{2}$ acres of corn in the field, a quantity of hay in the stack, 3 horses, 1 cow and 1 calf, 2 pigs, 1 threshing machine and horse-power, 1 cook-stove and fixtures, 1 parlour-stove, 1 side-board, 1 bureau, 6 cane chairs, 1 centre-table, 1 drop-leaf table, 7 common chairs, 1 rocking-chair, 3 bedsteads and bedding, 2 wash-stands, 2 lounges, 1 organ, 1 parlour-table, and a quantity of dishes." The sale was, by consent of the Bentleys, postponed from time to time, till the 4th November, 1880, when the oats and peas were sold by private arrangement for \$289; and the plaintiffs gave evidence of the sale of the threshing machine, the side-board, the centre-table, seven chairs, the organ, and the lounge, and the purchase thereof by connections of the Bentleys at merely nominal sums. The defendants denied that they had sold anything but the oats and peas, and their bailiff Gurley swore that he did not sell the chattels, and it was clear they were not paid for or removed from the possession of the Bentleys. The defendants claimed the right to distrain the goods and crops under their mortgage, as set out in the above special plea.

The learned Judge left it to the jury to say whether the chattels, other than the oats and peas, had been sold, and to find their value, if so, and the value of the oats and peas. The jury found the chattels, other than the oats and peas, had not been sold by the defendants, and they found the value of the latter to be \$289. The learned Judge

thereupon nonsuited the plaintiffs, on the ground that the defendants had the right to distrain under the mortgage, but reserved leave to move to enter a verdict for them for \$289, the value of the oats and peas, if the Court should think the defendants had not the right to distrain, as against the plaintiffs, the goods covered by their chattel mortgages.

May 17, 1881. *McMichael*, Q.C., obtained a rule *nisi* calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had, on the ground that the said nonsuit was contrary to law and evidence, there being clear evidence that all the goods and chattels claimed in the declaration were the property of the plaintiffs, and had been seized by the defendants, and the plaintiffs were therefore entitled to a verdict and substantial damages, and that there was no ground for the finding of the jury that all the goods and chattels were not sold, but only the grain; and on the grounds disclosed in affidavits and papers filed; and on the ground of surprise; or why the nonsuit should not be set aside and a verdict entered for the plaintiffs for the sum of \$289, pursuant to the leave reserved, on the ground that the defendants had no right to distrain: that there was no demise in the mortgage held by the defendants, and no words amounting to a demise, and no attornment or other act by which the relation of landlord and tenant was created, because when there was default for two months there could be no demise; and the contract to permit a distress could not affect the goods of a stranger.

On the 2nd June, *Ritchie* shewed cause. The nonsuit was right, and the plaintiffs should fail on one or all of the following grounds. The defendants had the right of distress under the provisions in that behalf in their mortgage; but if not after the default in the payment of the instalment due on the 1st November, 1879, crops grown on the land mortgaged were liable to be taken by the mortgagee at any time before removal thereof from the mortgaged premises, although they had been severed from the land and

harvested before the mortgagee entered; and at all events these plaintiffs had no right to question the mortgagee's right, as the chattel mortgages could not attach upon crops not *in esse* at the time they were given; in other words, a chattel mortgage was not a proper or apt instrument to transfer the owner's interest in seed sown or growing crops. On the first ground he referred to the *Trust and Loan Co. v. Lawrason*, 45 U. C. R. 176; *Munro v. The Commercial Building and Investment Society*, 36 U. C. R. 464, and cases there cited. On the second he cited *Robinson v. Fee et al.*, 42 U. C. R. 448; *Doe Upton v. Witherwick*, 3 Bing. 11; and on the third ground, *Hilliard on Mortgages*, 181-2; *Brantom v. Griffiths*, L. R. 1 C. P. D. 349; *Herman on Chattel Mortgages*, 299-300.

Bethune, Q. C., contra. The provision in the defendants' mortgage authorizing a distress for instalments in arrear, was only a license to distrain the goods of the mortgagor, and did not give any valid power to take the property of a stranger. The property in the crops did not pass by the mortgage to the defendants, having been granted by the chattel mortgage to plaintiffs while they were within the control and disposition of the mortgagor; and, at all events, having been severed by the mortgagor before the mortgagees entered, they did not pass to them; and as to the last question, there is no doubt growing crops are personal property which the owner can assign by chattel mortgage or bill of sale, although, not being capable of actual and immediate delivery or transfer, they are not within the Chattel Mortgage and Bill of Sales Act. But in this case the plaintiffs' chattel mortgages were duly filed, and no question under the Act arises. He relied upon *Brantom v. Griffiths*, L. R. 1 C. P. D. 349 (a), as an authority in his favour, approved of in *Ex parte Payne, in re Cross*, L. R. 11 Chy. D. 539.

June 25, 1881. CAMERON, J.—The right of distress is not an incident belonging to the position of a mortgagee, *qua* mortgagee simply of land, and he cannot distrain either upon his mortgagor, or the latter's tenant under a

(a) Reported also in L. R. 2 C. P. D. 212.

tenancy created after the mortgage, by mere force of the fee being vested in him by the mortgage: *Rogers v. Humphreys*, 4 A. & E. 299. The relationship of landlord and tenant must be created between him and the mortgagor to the same extent and upon the like terms that would justify a landlord distraining upon his tenant, or there must be an express provision in the mortgage itself before the right of distress accrues. In the former case the mortgagee has all the rights of a landlord: *The Trust and Loan Co. v. Lawrason*, 45 U. C. R. 176; and in the latter a mere license to distrain, which will not authorize the distraining of the goods of a stranger. In *The Royal Canadian Bank v. Kelly*, 19 C. P. at p. 209, Mr. Justice Gwynne stated the law thus: "There is a material difference, both in form and substance, between a mere license to distrain and an attornment. The former is simply collateral: it creates no tenancy; the latter creates a tenancy, and gives a remedy by distress as extensive as in other cases of tenancy. A mortgagor, then, although he may be tenant of the mortgagee, and as such entitled or not entitled to notice, according to the terms of the mortgage, yet may not be tenant at a rent, unless the mortgage contains an attornment clause, or a clause equivalent thereto, authorizing a distress for the interest in the nature of rent reserved, in which case his tenancy will be subject to the incidents of an ordinary tenancy; or he may retain possession, subject to a license to distrain collateral, although not tenant at a rent, to which license the ordinary right of a landlord to distrain the goods of a stranger on the premises is not an incident."

The mortgage in the present case does not contain any attornment clause, but does provide that until default the mortgagor should have quiet possession. It also provides that upon default in payment of any one instalment for two months the whole of the remaining instalments should become due, and the mortgagees should have quiet possession of the lands free from incumbrances. In the case of the *Royal Canadian Bank v. Kelly* the same learned

Judge came to the conclusion that the proviso for quiet enjoyment by the mortgagor until default, coupled with a covenant by him authorizing a distress for arrears of interest, with possession of the lands mortgaged by the mortgagor, created a tenancy, with the incident of the right of distress attaching thereto.

This judgment was reversed on appeal, 22 C. P. 279, but the judgment of the Court having been lost, the ground of reversal does not appear. It was the general impression of the Bar that it was on the ground that a stranger's goods were not liable to be distrained by a mortgagee, but later discussion of the subject has caused this to be doubted, and it has been conjectured that the decision turned upon the fact that the distress had been made more than six months after the mortgage money and interest had matured, and so it was not a distress authorized by the statute 8 Anne, ch. 14, sec. 6.

In the present case, the permission to the mortgagor to retain possession until default in payment of the first instalment made him at least lawfully in possession till the 1st of November, 1879, whatever may be the correct description of his holding; and did he, on that default, cease to be there of right and in his character of tenant? If so, in any view of the decision of *Royal Canadian Bank v. Kelly*, the right of distress did not exist at the time it was made, as the mortgagor's term had expired more than six months before that time.

In *Morton v. Woods et al.*, L. R. 3 Q. B. 658, where premises had been mortgaged for ten years, with an attornment and re-demise clause in the mortgage and a right to the mortgagee to enter and sell the premises either immediately or at any time, it was held that the tenancy created by the mortgage was a tenancy at will; and it may be in this case, as the mortgagees were not bound to enter for the default, or to assert their right to be paid the full mortgage money on such default, there was a continuing tenancy at will when the distress was made, and, if so, the crops, as emblements, belonged to the mortgagor or his assignee.

I incline to the view, however, that the right to continue in possession was determined by the default, and the right to make a distress was lost at the time this was made.

But, without determining that point, I think the right to distrain in this case was a mere license, and did not warrant the taking of a stranger's goods on the mortgaged premises.

This presents the question, were the crops seized the property of the plaintiffs, or were they the defendants' by operation of their mortgage, having been produced from the land after default in payment of the instalment due in November? As long as a mortgagee does not enter and take possession of the mortgaged premises, the crops sown and reaped by the mortgagor, or any tenant of his, are the property of such mortgagor or tenant; while there can be no doubt that if the mortgagee enters while the crops are growing, and before they are severed from the land, they belong to him.

For the latter proposition *Hodgson v. Gascoigne*, 5 B. & Ald. 88, is an authority, and for the former *Ex parte Temple*, 1 Gl. & J. 216, wherein Vice-Chancellor Leach said: "When it is said that, as between mortgagor and mortgagee, the mortgagee is entitled to emblements, the meaning is, that when the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to the mortgagee by the sheriff or otherwise, the *growing* crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use; but the principle does not apply to the case where the growing crops have been carried off by the mortgagor before the mortgagee obtains possession, and between the time of his demand and recovery of the possession. Let it be supposed that a mortgagee recovers the possession by ejectment from a mortgagor, who had personally occupied the property, after the crops are severed and sold: such a mortgagee might probably, if he thought it worth his while, bring an action for *mesne* profits from the time of the demise laid; but could he recover from the mortgagor anything more than the same occupation rent which he could

have recovered against the tenant of the mortgagor whose tenancy had commenced subsequently to the mortgage, and without the privity of the mortgagee? I do not apprehend that bankruptcy makes any difference in principle."

It seems strange that there is so little direct authority on the subject. I have always supposed the mortgagor had the right to crops grown upon the mortgaged land, and severed before the mortgagee obtained possession, and was surprised to find that there was so little in the way of decided cases upon the point. This last case is a clear authority for the position that where the mortgagor becomes tenant at will to the mortgagee, the crops belong to the mortgagor, as emblements. The learned Vice-Chancellor on this point said: "The mortgagor is here made not a constructive or *quasi* tenant at will, but a tenant at will by express contract, and like every other tenant at will by contract, he would be plainly entitled to the emblements."

The defendants have by their last plea expressly put their defence upon the right to distrain under the provision in that respect in the mortgage, and allege a tenancy unexpired at the time of the distress, and if they have not the right of distress as against the plaintiffs, they should fail, and this renders it necessary to determine whether the plaintiffs, as chattel mortgagees, took the crops under their mortgage. There is no doubt that, as far as the other chattels are concerned, they passed to them. The objection to their right to the crops is put on two grounds; first, growing crops cannot be assigned by chattel mortgage, and secondly, the crops in the present case were not *in esse* when the chattel mortgages were made.

The first objection does not appear to be entitled to any weight. The words of conveyance or grant used are sufficient to transfer either goods or lands, or any interest therein sufficiently described, and in the present case the description is sufficiently definite and certain.

As to the second objection. The evidence does not shew how long the grain had been sown, or whether it had ger-

minated or sprouted. The plaintiffs' evidence, which appears to be all there was on the subject, is: "The oats were just sown when they (plaintiffs) took the second mortgage."

In *Herman* on Chattel Mortgages, p. 299, the law is thus stated: "Growing crops, such as wheat and corn, cotton, potatoes, the annual produce of labour and cultivation of the earth, being personal chattels, may be the subject of a chattel mortgage. The owner or lessee of land may give a valid mortgage on his crop before it is raised. An instrument purporting to mortgage a crop, the seed of which has not been sown, cannot at the time operate as a mortgage; but after the seed has been sown and the crop is grown the mortgage lien attaches; but where the crop is just planted, and not yet up, the mortgage is void as property that is not in existence: property not capable of being identified at the time of its execution, cannot be mortgaged so as to give any valid lien thereon."

I do not see why in reason, after seed has been sown, the crops therefrom may not be validly transferred, as in fact they may be sufficiently identified by a description of the land in which they are sown; and it would seem absurd to say that six acres of oats, where the blades had appeared above the ground, would sufficiently identify the grain and it would be the subject of a chattel mortgage, and yet that six acres of oats where the heads were not above the ground, although the seed had been sown, would not. But as between the mortgagor and his mortgagee in equity, there can be no doubt the grain grown on the land described would pass to the latter, and if the defendants have only a license to distrain the mortgagor's goods, they could not take these crops more than any other goods that the mortgagor had not a disposing power over.

The defendants do not occupy the position of creditors under execution, and if they did, if it is not necessary that a bill of sale of growing crops should be filed, as shown in *Brantom v. Griffiths*, L. R. 3 C. P. 349, it is difficult to see how that would protect them from liability in the present

case, for by the sale of the crops there has been an unauthorized conversion thereof, depriving the plaintiffs of their rights, of which the defendants, according to the evidence, had notice, and thereby became liable in equity to the plaintiffs. That part therefore of the plaintiffs rule asking to have the verdict entered for them for \$289 should be made absolute, and the record should be amended by striking out of the declaration the goods other than the crops, so that the plaintiffs may not be estopped by the judgment in this case from thereafter claiming those goods.

ARMOUR, J.—I agree in the result, and in holding the provision for distraining in the defendants' mortgage to be a mere license not enabling the mortgagees to distrain the goods of third parties. I think the growing crops passed to the plaintiffs, and that growing crops are goods and chattels within our Chattel Mortgage Act.

HAGARTY, C. J., concurred.

Rule accordingly.

HAMILTON V. HARRISON.

Chattel mortgage—Statement of consideration—Growing crops—Registration—Affidavit.

The affidavit of *bona fides* in a chattel mortgage purported to be sworn before "T. B. F.," without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., &c."

Held, no objection to the affidavit of *bona fides*.

The consideration in the mortgage was stated as \$1,148; but it appeared in evidence that the amount actually owing was only \$1,030.80.

The learned Judge at the trial nonsuited the plaintiff, on the ground that the consideration was not truly stated, and that the mortgage was therefore void as against the defendant, an execution creditor.

Held (ARMOUR, J., dissenting), that the nonsuit was wrong, for the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud or no fraud.

The mortgage covered growing crops.

Held (ARMOUR, J., dissenting), that such crops being incapable of delivery or change of possession, without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act.

INTERPLEADER.

Plaintiff claimed certain goods seized in execution by the sheriff under a *fi. fa.* against Joseph Hall, at defendant's suit.

The trial was at Whitby, before Galt, J.

The plaintiff claimed under a chattel mortgage from Joseph Hall to her, dated 11th January, 1881, in consideration of \$1,148, stated to be then paid to the plaintiff. It covered a number of chattels and fifteen acres of fall wheat, and eight acres of rye in the field, subject to redemption in payment of \$1,148, and interest, on 1st January, 1882.

The plaintiff made the usual affidavit, and that Hall was truly indebted to her in the sum named.

This affidavit purported to be sworn before "Thompson B. Frankish," without any addition. It was followed by the affidavit of execution sworn before the same person, with the usual addition of his being a Commissioner in Queen's Bench, &c.

On objection taken to the first affidavit, Mr. Frankish was in Court, and it was admitted he was a commissioner.

The main question was as to the consideration not being, as defendant contended, truly stated in the mortgage. The

plaintiff was the only witness. She swore that Hall owed her \$600 at the date of the mortgage. He wanted more money, and she agreed to furnish the rest. She raised money by mortgage to a building society, dated 20th January, 1881, and on the 27th January, she got their cheques for \$368.25, which she paid to Hall.

On the date of the chattel mortgage she gave two notes, one for \$200, to the order of one Ruddy, the other for \$300, to Hall's order, thus making the \$500. These she produced at the trial unstamped. She said she gave those notes because the money required had not yet come from the building society. She applied for the loan the same day, and for the purpose of giving Hall the money, and when the money was got she was to get back the notes.

On the chattel mortgage was endorsed her receipt for \$112, dated 1st February, 1881.

Hall paid her \$112.80 on the \$600 she had previously borrowed from the same society for him. That amount was due them on the first loan, and they deducted it from the \$500 advanced on the second loan.

The learned Judge held the mortgage to be void on this evidence under the statute, the consideration not being truly stated, and directed a nonsuit.

May 19, 1881. *G. A. Mackenzie* obtained a rule *nisi* to set aside the nonsuit, and for a new trial on the ground that the chattel mortgage in question was a good and valid security as against the defendant, notwithstanding that the whole of the consideration mentioned therein was not actually advanced in cash to the mortgagor at the time the affidavit of *bona fides* was made by the plaintiff, and notwithstanding any other objection to the sufficiency thereof taken by the defendant; and as to the 15 acres of fall wheat and 8 of rye in the field mentioned in said chattel mortgage, on the further ground that even if the chattel mortgage did not comply with the Chattel Mortgage Act, the said last mentioned goods were the property of the plaintiff, compliance with the statute not being necessary, the said goods and chattels not being capable of actual delivery.

May 26, 1881. *McGillivray* shewed cause. There are two objections to the chattel mortgage under which the plaintiff claims: (1) the mortgagor was not justly and truly indebted to the plaintiff to the amount of the consideration mentioned in the mortgage at the date thereof, as the affidavit states; (2) the person before whom the affidavit of *bona fides* is taken does not state in what capacity he administers the oath. As to the first objection, it has been held, in *Robinson v. Paterson*, 18 U. C. R. 55, that where the consideration for the chattel mortgage partly consists of advances not yet made, but which the mortgagee only talked of making, the mortgage is in point of law void as against creditors. Here it is true notes to the amount of \$500 were given to represent the portion of the consideration not actually advanced; but they were unstamped, and therefore could not be sued on. The learned Judge was right in holding the mortgage void in law on this ground. As to the second objection, in *Nisbet v. Cock*, 4 App. R. 200, it is said: "It seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath." It does not appear here that the person administering the oath had authority to take it, and the statute is therefore not satisfied.

G. A. Mackenzie, contra. As to the first ground of objection, it is submitted that it is not requisite that the affidavit should be literally and strictly accurate. The Act does not make void such a transaction as this, which at common law is perfectly good. The plaintiff has made the only affidavit which the statute provides in such a case as this, and has therefore complied with the statute, while the character of the consideration might be a fair object of comment as affecting the question of *bona fides*. The learned Judge was in error in treating the mortgage as void in law, and withdrawing the case from the jury. *Robinson v. Paterson*, 18 U. C. R. 55, has been overruled by *Jaffray v. Robinson*, an unreported case in the Court of Appeal, decided in 1878 (a). Besides, this case is distin-

(a) See note (a), *post*, p. 132.

guishable from *Robinson v. Paterson* by the fact that notes were given and treated as cash : see *Walker v. Niles*, 18 Grant 210. It has been frequently held that it is not requisite to the validity of the mortgage that the affidavit should be strictly true, even if the affidavit here can be treated as not strictly true : *Baldwin v. Benjamin*, 16 U. C. R. 52 ; *Becher v. Austin*, 21 C. P. 334. If the affidavit is to be looked upon as untrue, the result is, that the statute does not provide for such a case as this, and that registration is not necessary : *Paterson v. Maughan*, 39 U. C. R. 371. As to the objection that the commissioner who took the affidavit of *bona fides* does not subscribe himself as a commissioner, it is to be observed that the affidavit is obviously taken by the same person stated in the jurat to the affidavit of execution to be a commissioner. In *Nisbet v. Cock*, 4 App. R. 200, the signature was omitted altogether. The objection that the form of the jurat in that case was quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statement does not apply here, nor do the other objections mentioned in the judgment and in argument. The statute does not require any particular form of jurat, nor that mere rules of Court should be complied with : See *De Forrest v. Bunnell*, 15 U. C. R. 370 ; *Moyer v. Davidson*, 7 C. P. 521.

June 25, 1881. HAGARTY, C. J.—We think the objection as to the *jurat* cannot be allowed to prevail.

The nonsuit is moved against as erroneous, and that the growing crops being incapable of actual delivery, &c., the mortgage as to them did not require registration.

There is a distinction between the requirements of a bill of sale or chattel mortgage under our law and that of England.

The Imperial Act 41-42 Vic. ch. 32 (1878), sec. 8, directs that the bill of sale “shall set forth the consideration for which such bill of sale was given,” otherwise to be held fraudulent and void.

There are several cases on this and the preceding statutes shewing that the Courts deal strictly with this provision,

and hold that an untrue statement of the consideration vitiates the instrument.

A late case, *Ex parte Charing Cross Advance and Deposit Bank, re Parker*, 44 L. T. N. S. 114, may be referred to as shewing the particularity required. The judgments of the Lord Justices of Appeal are very clear. They say "consideration" means "true consideration" (a).

Several cases are there cited shewing the state of the law, and it would appear that a retention of part of the expressed consideration for expenses, &c., would affect its validity.

Our statute, R. S. O. ch. 119, differs materially. No provision is made as to the mortgage itself containing any statement of the consideration (except under section 6, where it is given to secure the mortgagee against endorsements, &c.)

The mortgagee (under secs. 1 and 2) has to make affidavit that the mortgagor is justly and truly indebted to him in the sum mentioned in the mortgage, and further as to good faith, &c.

The point presented to us is shortly—is an erroneous statement of consideration in the mortgage *per se* sufficient to avoid it as a matter of law, or is it merely a circumstance to be considered by the jury in deciding the issue of fraud or no fraud?

Baldwin v. Benjamin, 16 U. C. R. 52, seems to shew that if the affidavits required by statute be made, the statute is *prima facie* complied with.

Robinson v. Patterson, 18 U. C. R. 55, was a County Court appeal. The statute seems to have been formally complied with, and the jury found for the mortgagee; the Judge below refused a new trial, and the Queen's Bench directed one without costs. The Chief Justice says, the question was, whether under the Act a mortgage was valid taken in a great part for a debt not yet actually existing, nor for advances which the mortgagee had agreed to make in writing, but which he merely talked of making, and had not made when the mortgage was executed or affidavit

(a) See *Hamilton v. Chaine*, L. R. 7 Q. B. D. 1, 319.

made. They considered that the statute does not allow a mortgage so given to be valid in law.

Walker v. Niles, 18 Gr. 210, is not unlike this case. The mortgage was for \$1,070; the amount appeared partly made up of a note given by the mortgagee, and not paid for some months afterwards, the affidavit in the usual form stating that the mortgagor was indebted in the full amount stated. In the absence of fraud this was held good, and that there was no rule of law requiring that the exact nature of the debt should be set forth in the mortgage.

Becher v. Austin, 21 C. P. 338, comments on *Baldwin v. Benjamin*; and in *Valentine v. Smith*, 9 C. P. 59, Gwynne, J., says: "A mortgage which would have been good but for the statute cannot be avoided by the statute when the conditions required for its validity by the statute are complied with." We are informed that a recent unreported case in the Court of Appeal, *Jaffray v. Robinson*, supports the decision of *Walker v. Niles*, and follows it (a).

We are of opinion that the nonsuit cannot be supported, that the case should have been submitted to the jury in the usual way. It was not, we think, a question of law, to be decided by the Judge, but one of fact by the jury.

It does not appear that the learned Judge's attention was called at the trial to the question of the growing crops inserted in the mortgage, or that the transfer of them might be valid at common law without registration, as being incapable of actual delivery or change of possession.

Brantom v. Griffiths, decided before the statute of 1878, L. R. 1 C. P. Div. 349, and a well considered case, is clearly in favour of the inapplicability of the provisions as to registration in case of growing crops.

I am unable to see any practical distinction between the wording of our Act and the former Imperial Act, on which this case was decided. The Imperial Act of 1878 defines

(a) The Reporter in Appeal states that there was no written judgment in this case, which was decided by the Court of Appeal in September, 1878. The Court held, approving of *Walker v. Niles*, 18 Gr. 210, that the mere misstatement in the affidavit of *bona fides* in a chattel mortgage of the true amount advanced did not, in the absence of fraud, avoid the mortgagee as against a subsequent mortgagee.

“personal chattels” and specially includes “growing crops” in the definition.

I cannot see how “an immediate delivery and an actual and continual change of possession,” mentioned in our Act, can take place on a mortgage of growing crops unless the mortgagee enter into actual possession of the land on which they grow.

ARMOUR, J.—By the R. S. O. ch. 119, sec. 1, “Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, made in Ontario, which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall within five days from the execution thereof be registered as hereinafter provided, together with the affidavit of a witness thereto of the due execution of such mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a true copy, and also with the affidavit of the mortgagee, or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith, and is properly authorized in writing to take such mortgage (in which case a copy of such authority shall be registered therewith).”

The terms “mortgage” and “conveyance intended to operate as a mortgage,” above used, necessarily include within them the sum secured, and such sum must be truly stated in them, otherwise the “mortgage” or “conveyance intended to operate as a mortgage,” which undoubtedly mean the *true* mortgage and the *true* “conveyance intended to operate as a mortgage,” cannot be said to be registered.

“Such last mentioned affidavit, whether of the mortgagee or his agent, shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage: that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due, and not for

the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him." Sec. 2.

"The sum mentioned in the mortgage" means obviously the sum secured thereby, and this means the *true* sum secured thereby, and the true sum must be stated in the mortgage, or conveyance intended to operate as a mortgage, because the mortgagee is required to swear that the mortgagor is justly and truly indebted to him in the sum mentioned in the mortgage.

The Imperial Act 41 & 42 Vict. ch. 31, provides that "every bill of sale * * shall set forth the consideration for which such bill of sale was given;" and Lush, J., says with regard to this provision, "By 'consideration' the true consideration is meant": *Re Parker*, 44 L. T. N. S. 115.

"In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor," &c. Sec. 4.

The "mortgage" or "conveyance" and "affidavits," mean the *true* mortgage or conveyance and affidavits, not false ones.

"Every mortgage or copy thereof filed in pursuance of this Act, shall cease to be valid, * * * after the expiration of one year from the filing thereof, * * * unless a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagor in the property claimed by virtue thereof, and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof, is again filed * * with an affidavit of the mortgagee, or of one of several mortgagees, or of the assignee or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees, duly authorized in writing for that purpose, which authority shall be filed therewith, stating that such statements are true, and that the said mortgage has not been kept on foot for any fraudulent purpose." Sec. 10.

I cannot bring my mind to the conclusion that this provision of the law would be complied with by filing false statements and a false affidavit, and if this provision requires true statements to be filed it goes far to shew that the true sum secured by the mortgage must be mentioned in it.

If the insertion of an untrue sum as the sum secured by the "mortgage," or "conveyance intended to operate as a mortgage," and the making a false affidavit by the mortgagee that the mortgagor is justly and truly indebted to him in such false sum, were held to be a compliance with the Act, it would be impossible for the sheriff or other officer properly to perform his duty in seizing and selling the equity of redemption of the mortgagor in the goods and chattels covered by the mortgage, for neither he nor the judgment creditor, nor any intending purchaser, could ascertain in such case the value of such equity of redemption.

It seems to be thought by some that this Act is to be regarded simply as a registration Act, and as enacted for the purpose of notice merely ; but this is wholly erroneous.

The object and intent of the Act were the benefit and protection of creditors, and to prevent their being defrauded by persons remaining in the actual possession of goods and chattels, and keeping up the appearance of being the owners of them, after having disposed of them by bill of sale, either absolutely or by way of mortgage, by requiring, in effect, that when such disposal takes place and is not accompanied by an immediate delivery and an actual and continued change of possession, the true transaction effecting such disposal shall be put in writing and registered, with affidavits verifying the truth of the transaction.

In *Heydon's Case*. 3 Co. Rep. 18, "it was resolved that, for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered :—

1st. What was the common law before the making of the Act ?

2nd. What was the mischief and defect for which the common law did not provide?

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

And 4th. The true reason of the remedy: and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

Now, whether I look at the Act itself, its several parts and its very words, or whether I consider the object and intent of the Act, construing it by these resolutions, I am equally driven to the conclusion that the true sum secured by the "mortgage" or "conveyance intended to operate as a mortgage," must be mentioned in it.

Were it otherwise, the Act, which was intended for the benefit and protection of creditors, might only prove a snare to them. Take, for example, the case of an execution creditor finding a chattel mortgage filed from his debtor, all in due form, for say \$1,000, the full value of his debtor's goods, and making up his mind from enquiries that this was a fictitious transaction, and directing the sheriff to seize the goods, and the mortgagee claiming them; an issue is directed, and it is shewn that only \$50 was actually advanced by the mortgagee to the mortgagor; but the jury find that no moral wrong was intended, and that the chattel mortgage is an honest security for the \$50; the creditor is defeated and obliged to pay all the costs, when, if the chattel mortgage had contained the true amount of \$50 instead of \$1,000, he would have directed the sheriff to seize and sell, the equity of redemption would have paid off the \$50, and would have realized his debt.

Sec. 5.—"Every sale of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods

and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by * * an affidavit of the bargainee * * that the sale is *bona fide* and for good consideration, as set forth in the said conveyance."

There is no substantial distinction can be drawn between "consideration, as set forth in the said conveyance," and "the sum mentioned in the mortgage," so as to require the true consideration to be stated in the bill of sale, and not to require it in the mortgage.

In *Arnold v. Robertson*, 8 C. P. 147, and in *Olmstead v. Smith*, 15 U. C. R. 421, it was held that the true consideration must be stated in a bill of sale, and if this were necessary in a bill of sale, having regard to the object and intent of the Act, how much more necessary must it be that the true sum secured must be stated in a mortgage.

Baldwin v. Benjamin, 16 U. C. R. 52; *Robertson v. Smith*, 9 C. P. 59, and *Becher v. Austin*, 21 C. P. 334, were referred to, but they have no application to the present case, because the true sum secured by the several chattel mortgages discussed in those cases was mentioned in them.

Walker v. Niles, 18 Grant 210, was also referred to, but neither does it resemble the present case. The chattel mortgage in that case was for the sum of \$1070, part of which was paid in cash, and the balance was paid by the negotiable promissory note of the mortgagee, given by him to the mortgagor, and accepted by the mortgagor as cash, which note was endorsed away by the mortgagor, and was paid by the mortgagee at maturity.

Robinson v. Paterson et al., 18 U. C. R. 55, more nearly resembles this case. In it the chattel mortgage was for £100, of which £60 had not been advanced when the mortgage was executed, sworn to, and registered, although the mortgagee had promised to advance it to the mortgagor. Robinson, C. J., says: "Admitting that there was nothing morally wrong intended, the question would be, whether since the Chattel Mortgage Act, 20 Vic. ch. 3, a mortgage

will be valid which is taken in a great part for a debt not actually existing, nor for advances which the mortgagee has not agreed in writing to make, but which he had merely talked of making and had not made when the mortgage was executed, nor, so far as we can find in the evidence, when the affidavit was made for registering the mortgage.

"If the plaintiffs had failed to pay the money afterwards the mortgage would still have stood incumbering the debtor's property, and deterring judgment creditors from making use of their executions.

"The statute does not, we think, allow a mortgage given and filed under such circumstances to be held valid in law, and in this case there does not seem to have been any change of possession. * * We think, therefore, that on the ground that the mortgage was made and filed under such circumstances, the transaction was not such as, consistently with the statute, 20 Vic. ch. 3, can be allowed to have dispensed with the necessity of an immediate and continued change of possession of the goods; and that the judgment given below discharging the rule for a new trial should be reversed, and a new trial be granted without costs."

In the present case the chattel mortgage is from Joseph Hall to the plaintiff, and is dated January 11th, 1881, purporting to secure the sum of \$1,148, payable, with interest at $7\frac{1}{2}$ per cent., on the 1st day of January, 1882.

The plaintiff's affidavit, attached thereto, states "that Joseph Hall, the mortgagor in the foregoing bill of sale by way of mortgage named, is justly and truly indebted to me, this deponent, the mortgagee therein named, in the sum of \$1,148, mentioned therein," &c.

The plaintiff was the only witness called on her behalf, and her evidence being uncontradicted, we have to say upon it whether what was done was a compliance with the Act, no matter whether moral wrong was thereby intended or not. It cannot be left to a jury to say upon undisputed evidence whether the Act was complied with or not; this

is a question of law which must be determined by the Court: the facts being, in effect, admitted, was the law complied with? If the law was not complied with, the mortgage is absolutely null and void, whether moral wrong was intended or not.

The way, according to her evidence, this consideration of \$1,148 was made up, was this: she and her sister had borrowed on their lands in December, 1879, \$600; that they lent this to Hall; that at the date of the chattel mortgage, Hall owed her this \$600, and \$48 interest on it; that she on that day gave her note for \$200 to one Ruddy for Hall, payable three days after date, and her note to Hall for \$300 payable three days after date, and thus the \$1,148 was made up; but it appeared from her examination, that what was lent to Hall in December, 1879, was not \$600 but \$595.60; adding to which the \$48 for interest would make \$643.60; but Hall had paid \$112.80 on account of this before the chattel mortgage was executed, which left him indebted to her in the sum of \$530.80, which, with the notes for \$500, would make \$1030.80, or \$117.20 less than the amount mentioned in the chattel mortgage. But the notes were unstamped, and were not paid at maturity; she was, at the time of making the chattel mortgage obtaining a loan from a company on a mortgage given by her for \$500; the proceeds of that loan were paid to her about the 1st February, 1881, and were \$368.25, which she gave to Hall and got back the \$500 in notes, so that Hall's debt to her then stood at \$899.05. She then endorsed \$112 on the mortgage, which reduced it to \$1,036, or \$136.95 more than the debt. It is clear, therefore, that the true sum was not mentioned in the mortgage, even assuming the notes to be taken as a part of it. I do not think they can be so taken. The balance of the mortgage money was to be paid from the expected loan, and thus the notes could only be looked upon as evidence of the agreement for the future advance of the proceeds of the expected loan; and the Act provides how security shall be taken for future advances. Besides, the notes never having been stamped were always wholly

worthless; besides, also, one half, at all events, of the \$595.60 was her sister's money, and Hall could not be said to be justly and truly indebted to her in respect of it.

I cannot hold that the insertion of an untrue sum as the sum secured by a mortgage, and the making of a false affidavit are a true compliance with the Act, without directly overruling *Robinson v. Paterson*, and this I am not disposed to do, for I think it well decided.

It would be strange indeed if leaving out the letter "s" in the word creditors in the affidavit, the translation of *bona fide* into English, and the omission of the person administering the oath to sign his name to the jurat, should all be fatal to the instrument, and the falsity of the affidavit should do it no harm.

I think the Act has not been complied with, and that such non-compliance is fatal to the mortgage.

The chattel mortgage covers, it is said, certain growing crops, and it is contended that growing crops are not within the Act. This was not urged at *Nisi Prius*, but was first urged in Term, and *Bantom v. Griffiths*, L. R. 1 C. P. D. 349, 2 C. P. Div. 212, was cited in support of the contention, but that case was decided upon the Imperial Act 17 and 18 Vic., c. 36. That Act provides for bills of sale of "personal chattels," our Act for mortgages and sales of "goods and chattels." The Imperial Act provides that "the expression 'personal chattels' shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery." Our Act provides no definition of the expression "goods and chattels," and I do not think we are at liberty to do so; and we cannot limit the meaning of the expression goods and chattels, for this would be legislation.

I think the rule should be discharged.

CAMERON, J., concurred with HAGARTY, C.J.

Rule absolute.

REGINA V. HODGE.

License Commissioners' resolutions—Infringement of—Delegation of legislative powers—Constitutionality of.

The Board of License Commissioners for Toronto acting under ss. 3, 4, and 5, of R. S. O. cap. 181, passed resolutions to the effect that no licensed victualler should sell any intoxicating liquor, &c., to any child apparently under the age of fourteen years, &c., and should not suffer any billiard table, &c., to be used in his tavern during the time prohibited by the Liquor License Act or by the resolution for the sale of liquor therein, and that any person infringing these resolutions should pay a penalty of \$20, to be levied by distress, and in default be imprisoned for fifteen days. The defendant having been convicted for breach of these resolutions,

Held, that the conviction was bad; for that the Legislature of Ontario had no power to delegate its authority and enable the License Commissioners to create new offences, and provide for punishing them.

THE defendant, a duly licensed tavern-keeper, was convicted before the Police Magistrate of the City of Toronto, first, for selling intoxicating liquors to a child apparently under fourteen years of age, viz., seven years of age, against the form of the resolutions of the License Commissioners for the City of Toronto for regulating Taverns and Shops, passed 26th April, 1881, the License Inspector being complainant, and was fined \$20, and \$2.85 costs, to be levied by distress &c.; in default, to be imprisoned for fifteen days at hard labour.

The following was the resolution in question :

“ A Resolution of the License Commissioners for the City of Toronto for Regulating Taverns and Shops.

Passed April 25th, 1881.

“Whereas by the Liquor License Act power is given to the Board of License Commissioners at any time before the first day of May in each year, to pass a resolution or resolutions for regulating the Taverns and Shops to be licensed, and also in and by such resolution to impose penalties for the infraction thereof. Therefore, the Board of License Commissioners in and for the City of Toronto, on this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-one, resolve, declare, and enact as follows :—

“ 1. No person who shall hereafter receive or hold any license under the Liquor License Act, or any Act now passed or hereafter to be passed amending the same, or any transfer of any such license, for or in respect of any Tavern or Shop within the City of Toronto, shall by himself, his

servant, or agent, either directly or indirectly, sell, barter, give, or deliver; or permit, allow, or suffer to be sold, bartered, given, or delivered, at such Tavern or Shop, or out of or from the same or the premises connected therewith, any intoxicating liquor to any intoxicated person, or to any child apparently under the age of fourteen years, or to any lunatic or idiot, or to any person having the habit of drinking intoxicating liquor to excess, and to whom such licensed person has been notified in writing not to deliver such liquor pursuant to the nineteenth section of the Liquor License Act. Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow or suffer any drunken or disorderly person, or any keeper of or resident in any house of ill-fame, or any prostitute, or any person having the habit of drinking to excess and in respect to whom such licensed person has been notified as aforesaid, to resort to or frequent such Tavern or Shop. Nor shall any such licensed person, directly or indirectly as aforesaid, sell or otherwise dispose of, or permit, allow, or suffer to be sold or otherwise disposed of, any intoxicating liquor in such Tavern or Shop, or in or upon any premises connected therewith, after the hour of twelve o'clock at night on Mondays, Tuesdays, Wednesdays, Thursdays, or Fridays, and before the hour of five o'clock on the following morning, unless a requisition for medicinal purposes, signed by a medical practitioner or by a clergyman, is produced by the vendee or his agent, nor permit, allow, or suffer any such liquor to be drunk in such Tavern, Shop, or premises during the time prohibited by this resolution for sale of the same by any person other than the occupant or some member of his family or lodger in his house. Nor shall any unlicensed person, directly, or indirectly as aforesaid, permit, allow or suffer any bowling alley, billiard, or bagatelle table to be used, or any games or amusements of the like description to be played in such Tavern or Shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act, or by this resolution, for the sale of liquor therein. Nor shall any such licensed person directly or indirectly as aforesaid permit, allow, or suffer at any time or times in such Tavern or Shop, or in or upon any premises connected therewith, any games of cards, dice, or other games of chance, for money, drinks, or other consideration to be played, or any exhibition of animals, or natural or other curiosities, or of fencing, boxing, wrestling, or other trials of strength or skill, to be held, or any plays or theatrical representations, or entertainments of music or dancing, to be given, or any entertainment or exhibition whatsoever, calculated to attract or allure numbers of persons or to promote tippling, to be held or given in such Tavern or Shop, or premises connected therewith, at any time or times whatsoever.

"2. Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the Police Magistrate of the City of Toronto, forfeit and pay a penalty of twenty dollars and costs, and in default of payment thereof forthwith, the said Police Magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the said Police Magistrate shall by war-

rant commit the offender to the common gaol of the City of Toronto, with or without hard labour, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment be sooner paid.

“W. W. OGDEN, *Chairman, License Commissioners.*

“JAS. MCGEE, *License Commissioner.*

“C. B. DOHERTY, *License Commissioner.*

“THOMAS DEXTER, *Secretary and Inspector.*”

The evidence shewed that the liquor, viz., a pint of beer, was sold to the child to be carried home to his father for his dinner. He had been sent with the money by his father.

The defendant was also convicted for that he, the defendant, (being such licensed innkeeper) did unlawfully permit and allow a billiard table to be used, and a game of billiards played thereon, in his tavern during the time prohibited by the Liquor License Act for the sale of liquor therein, &c., against the form of the resolution of the License Commissioners for the city of Toronto, for regulating taverns and shops, passed 25th April, 1881. The City License Inspector was the complainant, and the defendant was sentenced to pay a fine of \$20 and costs, &c., or to be imprisoned for fifteen days at hard labour.

May 27, 1881. *J. K. Kerr*, Q. C., obtained a rule *nisi* calling on the Police Magistrate and the complainant to shew cause why the conviction should not be quashed, on the following grounds: 1. That the resolution of the Licensed Commissioners was illegal and unauthorized. 2. That they had no authority to pass resolutions prohibiting the sale of liquor to persons under fourteen. 3. Or to those apparently under that age, having the consent of parents. 4. That the evidence shewed the sale was to the father. 5. That the sale was with the father's authority. 6. That the commissioners had no power to authorize the imposition of fine or imprisonment, in default. 7. That the Act under which they assumed to pass the resolution, was beyond the authority of the Legislature of Ontario, &c. 8. That the conviction was bad in form, &c. And on grounds disclosed in affidavits and papers filed.

June 1, 1881. *Fenton*, County Crown Attorney, shewed cause. The R. S. Ont., ch. 181, secs. 4, 5 and 70, con-

ferring powers on the License Commissioners to pass the resolutions under which these convictions were had, is constitutional. The exclusive authority given to the Local Legislature, by the B. N. A. Act, to deal with these subjects, is not limited, and confers the right to authorize Municipal Councils, Police or License Commissioners to pass by-laws within proper limits, as existed before the Act. As to constitutional powers of Local Legislatures under B. N. A. Act, see *Regina v. Boardman*, 30 U. C. R. 553; *Slavin and the Corporation of Orillia*, 36 U. C. R. 159; *Severn v. The Queen*, 2 S. C. 70; *Queen v. City of Fredericton*, 3 S. C. 505; *Citizens' Ins. Co. v. Parsons*, 4 S. C. 215. The framers of the B. N. A. Act did not intend that the Local Legislature should be restricted like a large County Council, but, on the contrary, gave it exclusive, *i. e.*, sovereign power to legislate in certain matters, subject only to the disallowance of its Acts. R. S. O. ch. 181, secs. 4, 5 and 70, was not disallowed, and the authority conferred by these sections upon the License Commissioners to pass by-laws, is not a delegation of the Local Legislature's power, but a reasonable and customary exercise of its exclusive, *i. e.*, sovereign authority, in those matters. As respects the prohibition, sale, or delivery of intoxicating liquor at taverns to a child under fourteen, the resolution of the License Commissioners is a reasonable and valid exercise of their power to regulate taverns and shops: *Brodie and The Corporation of the Town of Bowmanville*, 38 U. C. R. 580; *Ross and the Corporation of the United Counties of York and Peel*, 14 C. P. 171; *Greystock and The Municipality of Otonabee*, 12 U. C. R. 458. It is to be noticed that the resolution does not prohibit the sale or delivery of liquor to children generally, (for such lay within the power of the Municipal Council under R. S. O. ch. 174, sec. 461, sub-sec. 25), but it merely prohibits the licensee from selling, &c., to such children in the licensed tavern or shop, and so is a mere regulation of the business there. Children of any age can still, of course, get intoxicating liquor for medicinal purposes at drug shops

without restriction, and it is in the public interest that young children should be prevented from procuring intoxicating liquor for other purposes. As respects the prohibiting of billiard playing in licensed taverns, &c., during the time when the sale of liquor is prohibited therein, it will be noticed that the resolution does not regulate billiards, but only the licensed tavern. The Municipal Act, R. S. O. ch. 174, sec. 461, sub-sec. 3, gives the Municipal Council power to license and regulate billiards. This the resolution does not interfere with, but the License Commissioners are entitled to restrict their licensees reasonably in the use of billiards in their licensed premises: *Arkell and The Corporation of St. Thomas*, 38 U. C. R. 594; *Neilly and The Corporation of the Town of Owen Sound*, 37 U. C. R. 289.

J. K. Kerr, Q.C., contra. The Local Legislature had no power to delegate its authority to legislate, and the R. S. O. ch. 181, secs. 4, 5 and 70 were *ultra vires*, and the resolution of the License Commissioners is invalid. The clause as to billiards is an interference with the powers of the municipal councils under the Municipal Act, R. S. O. ch. 174, sec. 461, sub-sec. 3, and the clause as to sales of liquor to a child is an interference with the same powers under the same sec., sub-sec. 25.

June 25, 1881. HAGARTY, C.J.—It was stated to us that the parties desired to present directly to the Court the very important question whether the Local Legislature, assuming that it had the power themselves to make these regulations and create these offences and annex penalties for their infraction, could delegate such powers to a Board of Commissioners, or any other authority outside their own legislative body.

The R. S. O. ch. 181 sec. 3, appoints a Board of License Commissioners of three persons.

Sec. 4. "The Commissioners may at any time before the 1st day of May in each year, pass resolutions for regulating," &c.

1. "For defining the conditions and qualifications requisite to obtain tavern licenses," &c.

2. "For limiting the number of tavern and shop licenses," &c.

3. On the same subject.

4. "For regulating the taverns and shops to be licensed."

5. "For fixing, &c., the duties of the Inspector of Licenses," &c.

Sec. 5. "In and by any such resolution of a Board of License Commissioners the said Board may impose penalties for the infraction thereof."

Sec. 70. "In all cases where the Board of License Commissioners in cities passes a resolution in pursuance of the powers conferred upon them by the fourth and fifth sections of this Act, and in and by any such resolution penalties are imposed for the infraction thereof, such penalties may be recovered and enforced by summary proceedings before the Police Magistrate, &c., in the manner and to the extent that by-laws of municipal councils may be enforced under 'The authority of the Municipal Act,' and the convictions in such proceedings may be in the form set forth in sec. 407 of the said last mentioned Act."

37 Vic. ch. 32 (1874) sec. 9, O., allowed the Commissioners of Police in cities to pass by-laws much to the same effect as the revised Act allows. Sec. 48 gives them power by such by-laws to attach penalties recoverable before police magistrates to the same extent that by-laws of city councils might be enforced under the Municipal Act.

At the time of Confederation the law appears to have been under the Act of Canada, 1866 : 29 & 30 Vic. ch. 51.

By sec. 249 the Commissioners of Police in cities might pass by-laws for granting tavern licenses, and by sub-sec. 2 for declaring the terms and conditions required to be complied with by applicants, and the security to be given for observing the same.

By sub-sec. 6, for regulating the houses or places licensed.

By sec. 262, the same body by by-law could appoint License Inspectors, and define their duties.

Section 284 empowered the city council to pass by-laws to prevent the sale or gift of liquor to a child, apprentice, or servant without the consent of a parent or master, &c.

The statute contains direct provisions and penalties for breach of its several provisions respecting taverns, as in secs. 254 to 260. We find no power given by the Act to any other body to create any new offence as to keeping a tavern.

Sec. 246 allows the council to pass by-laws (sub-sec. 6) for inflicting reasonable limited penalties or fines (*inter alia*) for breach of any of the by-laws of the corporation; and (sub-sec. 8) for limited imprisonment for breach of any of the by-laws of the council, where the fine is not paid "except for breach of any by-law or by-laws in cities, and the suppression of houses of ill-fame, for which the imprisonment may be for any period not exceeding six months," &c.

This Act was amended in the first session of Ontario, 31 Vic. ch. 30. In the next session an Act was passed as to tavern licenses, 32 Vic. ch. 32.

By sec. 6 the Commissioners of Police in cities might pass by-laws as to issuing of licenses, &c.; and by sub-sec. 2 the terms and conditions to be observed by applicants were declared. Sub-sec. 6 regulated the houses or places to be licensed.

Numerous provisions are contained in the Act to be observed, and penalties provided for their infraction.

Sec. 38 allows the Police Commissioners, when authorized under this or any other Act or law, to make by-laws. They shall have power by such by-laws to attach penalties for the infraction thereof, to be recovered summarily, and in the manner and to the extent that by-laws of city councils might be enforced under the Municipal Act of 1866.

This seems to be the first legislation empowering a Board to attach penalties to their by-laws as to taverns, apart from the powers given to Municipal Councils.

There was another amendment by 33 Vic. ch. 28, not affecting this question.

The license law is further amended by fresh provisions and penalties being enacted, 36 Vic. ch. 34, sec. 8, directing the Police Commissioners to appoint an officer for the observance and enforcement of any by-law of the Municipality with respect to tavern and shop licenses.

The Consolidated Municipal Act of 1873, sec. 337, repeats the already quoted provision of the Act 32 Vic. ch. 32, sec. 38, as to the Board of Commissioners attaching penalties for the infraction of their by-laws.

The Act of 1874 professes to consolidate the Acts as to tavern licenses, and 37 Vic. ch. 32, sec. 48, repeats the same clause just cited.

39 Vic. ch. 26, sec. 1, 1875, declares that all powers and duties conferred on Commissioners of Police and Municipal Councils by the 37 Vic. ch. 32, shall hereafter exclusively belong to and be exercised by a Board of License Commissioners of three persons, to be appointed by the Lieutenant-Governor in Council.

40 Vic. ch. 18 makes additional provisions as to the License Inspectors and the general regulations of taverns.

The next legislation is under the R. S. O. ch. 181, already cited, in effect substituting the Board of License Inspectors for the Board of Police Commissioners, under the 37 Vic. ch. 32.

An Act of last session, 44 Vic. ch. 22, sec. 17, allows an appeal from any judgment, quashing a conviction under R. S. O. ch. 181, in the option of the Attorney-General.

It is conceded that these convictions are for the breach of certain provisions contained in these resolutions, and rest wholly on them as creating the liability to penalty and to punishment, and that such penalty, &c., is wholly the creation of such resolutions. We are thus brought in face of a very serious question, viz., the power of the Ontario Legislature to vest in the License Board the power of creating new offences, and annexing penalties for their commission.

Down to the date of Confederation we find no such powers given to any such Board. Large powers were dele-

gated to municipal councils to pass by-laws for various specified objects, and to annex fines to a named limit, and penalties of imprisonment for a limited period for the non-payment of such penalties. Such a delegation was of course unobjectionable when done by a Legislature of unlimited authority in both criminal and civil proceedings.

The British North America Act completely re-arranged our Constitution and established the Dominion and Provincial Governments with defined powers and duties.

The criminal law and procedure in criminal matters are reserved for Parliament.

In each Province the Legislature may exclusively make laws in relation to certain specified matters. Amongst them are Municipal Institutions, Shop, Tavern, Auctioneers' and other licenses, in order to the raising of a revenue, &c.

"The Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdictions, and including procedure in civil matters in those Courts," is provided for.

"The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section (92)," and "generally all matters of a merely local or private nature in the Province."

It seems reasonably clear that all legislative powers throughout the Dominion rest wholly on this Federation Act—the work of the Imperial Parliament, having unquestioned jurisdiction over the Empire of which we form a part.

In *Leprohon v. The Corporation of the City of Ottawa*, 2 App. R. 522, I had occasion, with the other Judges in Appeal, to discuss the relative positions of the Dominion and Provincial Legislatures.

The subject is fully discussed in the Supreme Court, in such cases as *The City of Fredericton v. The Queen*, 3 Sup. Ct. 505; *Valin v. Langlois*, *Ib.* 1; *Severn v. The Queen*,

2 Sup. Ct. 70; *Citizens' Ins. Co. v. Parsons*, 4 Sup. Ct. 215.

As we are obliged to hold that our Legislature is not acting under an original jurisdiction, but under the special authority given to it by the Confederation Act, we have to decide now whether this special power has been exercised, or some larger power endeavoured to be exercised beyond the grant.

Our Legislature has certainly delegated to the Board of License Commissioners the creation of certain new restrictions and limitations on individual liberty of action.

In *Regina v. Burah*, L. R. 3 App. 889, Lord Selborne, at p. 904, says: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which prescribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

This was in reference to an Act of the Indian Legislature, which excludes the jurisdiction of the High Court within certain districts, which was held not to be inconsistent with the Indian High Court Act (Imperial). The 9th sec. of the Indian Act conferred upon the Lieutenant-Governor of Bengal the power to determine whether the Act or any part of it should be applied to a certain district. This was held to be conditional legislation, and not a delegation of legislative power.

Lord Selborne says, at p. 105: "It leaves to the Lieutenant-Governor to say at what time that change shall take place, and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law or part of a law which either already was, or from time to time might be, in force, by proper legislative authority, 'in the other territories of his government.' * * The proper Legislature has exercised its judgment as to place, person, laws, powers, and the result of that judgment has been to legislate condition-

ally as to all these things. The conditions having been fulfilled the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may well be exercised either absolutely or conditionally. Legislation, conditioned on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and in many circumstances it may be highly convenient."

The distinctions here pointed out are very intelligible. Naming an official to fix the time for the operation of a law to commence, or the area over which it was to extend, must be a very different matter from appointing an official to declare what shall be the law, and what punishment shall be appointed for its infraction. Conditional legislation and a delegation of power to another body must always be very distinguishable.

Assuming that the Legislature can themselves impose these restrictions, and annex to their violations these penalties, can they delegate their power, exercisable in their discretion, to the discretion of any person or number of persons outside their assembly?

In the words of the B. N. A. Act, has this defendant, by disobeying the resolutions of the License Board, broken "any law of the Province?" He has offended against the regulations by the board established for the city of Toronto. The eight or nine cities of Ontario may thus have as many widely differing local regulations as to taverns. The Legislature has not enacted any of them, but has merely authorized each board in its discretion to make them.

It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first, of creating a *quasi* offence, and then of punishing it by fine or imprisonment. We think it is a power that must be exercised by the Legislature alone.

In all these questions of *ultra vires* we consider it our wisest course not to widen the discussion by considerations

not necessarily involved in the decision of the point in controversy.

We therefore enter into no general consideration of the powers of the Legislature to legislate on this subject, but assuming their right so to do, we feel constrained to hold that they cannot devolve or delegate their powers to the discretion of a local board of commissioners.

We think the defendant has the right to say that he has not offended against "any law of the Province," and that the convictions cannot be supported.

We perceive that by the Act of last Session special power is given to the Attorney-General to appeal, if he think proper, against our decision.

ARMOUR and CAMERON, JJ., concurred.

Convictions quashed.

REGINA V. FRAWLEY.

Hard labour—Power of Provincial Legislature to impose.

The power to imprison only does not include the power to impose hard labour as well; and the Ontario Legislature therefore cannot, under the B. N. A. Act sec. 92, add hard labour to imprisonment.

The defendant was, on the 28th of December, 1880, convicted before the police magistrate, at Chatham, for unlawfully keeping liquors at his house for sale without license. Being a second offence he was sentenced to imprisonment in the common gaol, to be kept at hard labour for three months.

The conviction appeared to have been under sec. 51 R. S. O. ch. 181, sec. 68, directing that the proceedings shall be according to the provisions and after the forms contained in the Summary Convictions Act of 1869, 32-33 Vict. ch. 31, D.

Ogden obtained a rule *nisi* to quash, on the grounds:—

1st. That the statute on which the defendant was convicted was *ultra vires* the Ontario Legislature.

2nd. That the Legislature had no power to impose hard labour.

May 21, 1881. *Hodgins*, Q. C., shewed cause. The question is *res judicata*, for this Court has held in *Regina v. Boardman*, 30 U. C. R. 553, that the 32nd and 33rd sections of 32 Vic. ch. 32, imposing "hard labour," with imprisonment, for offences against the License Act of 1868, are "within the reasonable scope of the powers conferred on the Local Legislature," and were passed "with a view of effectually enforcing the law which they had the power to make." The British North America Act constituted each Province a sovereignty in respect of the legislative powers conferred upon it, and sec. 92, sub-sec. 13, gives each Provincial Legislature power to impose "punishment by fine, penalty, or imprisonment, for enforcing any law of the province." Fine and imprisonment are, at com-

mon law, the ordinary and appropriate punishments for misdemeanor: *Greaves's Criminal Statutes* 6; 2 *East's P. C.* 838; *Bishop's Criminal Law*, I. 940. A penalty may be recoverable in a civil action or in a criminal proceeding: *Bishop's Criminal Law*, I. 956. Thus, a power to punish for offences equivalent to misdemeanor was conferred upon the Legislature. The power to legislate on certain classes of subjects carries with it incidental and necessary powers for the enforcement of laws so passed: *Regina v. Roddy*, 41 U. C. R. 296; *Ulrich v. National Ins. Co.*, 42 U. C. R. 157. "Hard labour" is made incident to imprisonment for the better enforcement of the Liquor Law, and the Legislature has deemed it necessary, owing to the constant infractions of the law, and as a police regulation for the suppression of riotous and disorderly conduct arising out the use of intoxicating liquors. [HAGARTY, C. J.—Could this Court, where authorized to punish by imprisonment, add the further punishment of hard labour?] No, for this Court represents what is termed the judicial power of the Province, and it has not the sovereign or parliamentary power which is vested in the Legislature. But the Courts established by the Provincial Legislature derive from it a power, as incidental to their authority, of imprisoning for contempt of Court, which is a criminal proceeding. The Court of Queen's Bench in Quebec has held that, while the Parliament of Canada has power to legislate generally respecting criminal procedure, each of the Provincial Legislatures has power to make laws respecting the quasi criminal procedure for the enforcement of its penal statutes, and that such power is incidental and necessary in these quasi criminal matters: *Pope v. Griffith*, 16 L. C. Jur. 171; *Page v. Griffith*, 17 L. C. Jur. 302. Where power to impose a penalty is given by statute, it implies a power to enforce it: *Dwarris on Statutes*, 23. Before the British North America Act, and since 1849, municipal councils had power to pass by-laws imposing imprisonment, and since 1851, imprisonment with or without hard labour, for viola-

tions of their local by-laws : 12 Vic. ch. 81 sec. 31 subsec. 29 ; 14 & 15 Vic. ch. 109 sec. 36, Schedule A No. 7, p. 2115 ; 22 Vic. ch. 99, sec. 242, sub-sec. 8 ; C. S. U. C. ch. 54, sec. 243, subsec. 8 ; 29 & 30 Vic. ch. 51, sec. 246, sub-sec. 8. And the Liquor License Acts, since March, 1859, have provided imprisonment with hard labour for cumulative offences against these Acts : 22 Vict. ch. 6, sec. 2 (1859), C. S. U. C. ch. 54, sec. 255 ; 29 & 30 Vict. ch. 51, sec. 258. The exclusive legislative authority over the Municipal and Liquor License laws is vested in the Provincial Legislature, and carries with it the power to prescribe similar punishment for infractions of these laws, If the Legislature has no power to impose hard labour, it had no power to repeal the former Acts, which enabled municipal councils to impose hard labour for infractions of their by-laws : *Slavin and The Corporation of Orillia*, 36 U. C. R. 167. Within its legislative powers, the Province is as sovereign and absolute as the Dominion is within its powers, and each is clothed with implied and incidental powers, where necessary for the proper exercise of its governmental and legislative functions, and for the better enforcement of the laws it has the exclusive authority to pass. It is conceded that the Legislature may enforce fine and imprisonment, and it would be an anomaly if, while with imprisonment it may enforce a fine or penalty against an offender's property, it cannot, instead of a fine or a long imprisonment, enforce his employment at labour either as a regulation of prison discipline or as a penalty for cumulative offences. This view would give the Legislature less legislative power than that possessed by the municipal councils it creates : *Page v. Griffith*, 17 L. C. Jur. 302. He also referred to *Regina v. Frawley*, 45 U. C. R. 227.

Ogden, contra, The Local Legislature did not acquire power to legislate on every subject, and the only authority they have on this subject is that conferred by the Confederation Act, which says (sec. 92, sub. 15) they may enforce their laws by the imposition of punishment by fine, penalty, or imprisonment, thereby clearly limiting the nature

of punishment, but not the degree. Power cannot be implied, it must be plainly conferred, in matters of this nature. 32-33 Vic. cap. 29. sec. 94, D., only refers to offences where the imposition of hard labour has already by some other law been made portion of the punishment, and does not enact additional punishment. Hard labour is an additional and substantive penalty, and cannot be considered as incident to discipline. The only case where it might be possible to add anything similar would be for crimes, and if it is incident in this case the offence is a crime, and consequently out of the power of the Local Legislature. Hard labour implies a crime: *Easton's case*, 12 A. & E. 645. The Provincial Legislature must not undertake to expound the Statute which brings it into existence.

In *Regina v. Boardman*, 30 U. C. R. 181, hard labour had not been imposed, and therefore the question as to the right to enforce it was not material, and the expression of the learned Chief Justice was not intended to go as far as Counsel for the Crown now contends.

In *Regina v. Lawrence*, 43 U. C. R. 164, Mr. Justice Gwynne, on the motion for *certiorari*, expressed himself so strongly against the right to enforce hard labour that before returning the conviction the words were struck out. In *Regina v. Black* 43, U. C. R. 181, the late Chief Justice of this Court expressed an opinion adverse to the power here exercised.

Ulrich v. The National Ins. Co., 42, U. C. R. 157, does not conflict with the contention here. The Statutes in force in Upper Canada prior to confederation cannot apply in this case, as the conviction is under the Ontario Liquor Licence Act. He also referred to *Regina v. Roddy*, 41 U. C. R. 291.

June 25, 1881. HAGARTY, C. J.—The case was argued before us wholly on the point as to the power of the Legislature to impose hard labour.

Defendant's counsel insisted that a power to imprison did not authorize the further sentence of "hard labour," which is a substantive punishment.

For the Crown it was urged that a Legislature, having the admitted right to imprison, must also have the power to add hard labour as a consequence, or as a matter of prison discipline.

We have had occasion, in another case argued this Term, to again consider the extent of the powers conferred by the B. N. A. Act on the Local Legislature (a).

It seems to us that the decision in this case must turn on the simple point, does a power to punish by imprisonment carry with it the power to inflict hard labour in addition to the power to restrain personal liberty?

There is no express decision on this point in our Courts.

In *Regina v. Boardman*, 30 U. C. R. 553, it is not stated, in the report, that the imprisonment awarded was accompanied by "hard labour."

Harrison, Q. C., for the prisoner, objected that 32 Vict. ch. 32. sec. 32, O., being to create an offence punishable by hard labour, in other words, *a crime*, was an enactment relating to the criminal law and *ultra vires*.

The judgment of Richards, C. J., upheld the power of the Legislature to pass the Act, and that they had the power to impose punishment by fine or imprisonment for enforcing any law passed by them in matters within their jurisdiction.

It was a conviction for compromising an offence under the liquor law. The chief discussion was, whether the charge involved the commission of "a crime."

The learned Chief Justice says: "By the 32nd section they provide for the imprisonment at hard labour in the common gaol of any person who had violated the statute, who should compound or settle the offence. * * This all seems to us within the reasonable scope of the powers conferred on the Local Legislature."

The attention of the Court seems never to have been directed to the "hard labour" question, and on sending for the papers we find that the conviction was *not* for imprisonment with hard labour.

(a) See *Regina v. Hodge*, ante, 141.

The learned counsel, when afterwards Chief Justice of the same Court, says, in *Regina v. Black*, 43 U. C. R. at p. 192: "The question whether the Imperial Legislature * * meant, under the words 'the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province,' &c., as used in sec. 92, sub-sec. 14 of the B. N. A. Act, to confer on the Provincial Legislature power to imprison *at hard labour*, is one upon which we have considerable doubt, but are not called upon at present to decide the point. It may be when the point arises that the decision of this Court in *Regina v. Broadman*, 30 U. C. R. 533, decided shortly after the Confederation Act, which apparently affirms the powers of Provincial Legislatures to authorize imprisonment at hard labour, will demand reconsideration in the light of more recent decisions."

He refers to *Regina v. Roddy*, 41 U. C. R. 291, where there is a learned discussion as to what is a crime or criminal matter, citing, *inter alia*, *Easton's case*, 12 A. & E. 645.

In *Regina v. Lawrence*, 43 U. C. R. 166, before Mr. Justice Gwynne, in single Court, and confirmed on Appeal, in full Court, the conviction was under sec. 57 of ch. 181, R. S. O., for inducing witnesses for a prosecution to absent themselves, imposing a fine and imprisonment, in default of distress, for thirty days, at hard labour.

The Ontario Act, authorizing the conviction, did not empower "hard labour" to be imposed, and the points discussed do not touch this question.

"Imprisonment" has been defined to be "nothing else but a restraint of liberty:" 2 Hawk. P. C. 8th ed., 184.

The word "penalty," when used as here, "fine, penalty, or imprisonment," must, we think, mean merely what is sometimes defined to be "a pecuniary fine or mulct." There are money penalties, and corporal or personal penalties. See *Wharton's Law Dict.*, *Tomlins's Law Dict.*, *Abbott's Law Dict.*, and an American authority there cited: *Kenney v. Hosea*, 3 Harr. (Del.) 77.

We are satisfied that if the law merely direct imprison-

ment as the punishment of an offence, no Court of Justice can, in the absence of any general discretionary power to that effect, award hard labour in addition. We are of opinion that it is an additional substantive punishment, varying only in degree from the infliction of whipping or the treadmill, solitary confinement, &c., &c.

All the text books separate the punishment—imprisonment, or imprisonment with hard labour, &c. Hard labour is in fact a statutable addition to imprisonment, generally to be found enacted in the Act creating the offence, sometimes in statutes giving it as a discretionary power to a Court in awarding imprisonment.

As in the Imperial Malicious Injuries Act, 24 & 25 Vic., ch. 97, sec. 74, whenever imprisonment with or without hard labour may be awarded for any indictable offence under this Act, the Court may order imprisonment, or to be imprisoned and kept to hard labour, &c. Also in the Larcenies Act, same year, ch. 96, sec. 118, to same effect, always separating the two punishments: See *Cox and Saunders's Criminal Acts*, pp. 97, 136, 230.

Collyer on Criminal Statutes, 524, calls 3 Geo. IV., ch. 114, the Hard Labour Act. This Act recites 53 Geo. III., ch. 162, which repeals and extends the provisions of 52 Geo. III., ch. 44, all of which, with increasing application, allow hard labour to be added to imprisonment.

Our Upper Canada Act, 1833, 3 Wm. IV., ch. 4, sec. 25, speaks of the Court adjudging a prisoner "to be imprisoned only, or imprisoned and kept to hard labour."

Consol. Stat. C., ch. 99, sec. 102, the Criminal Procedure Act, declares that a sentence of imprisonment in the Penitentiary shall include hard labour, whether expressed or not. By sec. 110, on conviction of any offence for which imprisonment other than in the Penitentiary may be awarded, the Court may sentence to imprisonment, or to be imprisoned and kept to hard labour in the common gaol, &c., and may also direct solitary confinement.

The Procedure Act of 1869, 32-33 Vic. ch 29, sec. 94, directs that on a conviction for an offence for which im-

prisonment other than in the Penitentiary may be awarded, the Court may sentence the prisoner to be imprisoned, or, if hard labour be part of the punishment, then to be imprisoned and kept to hard labour, or if solitary confinement be part of the punishment, then it may be so directed, &c. Section 97 repeats the former clause as to Penitentiary imprisonments.

The Summary Conviction Act of the same session, ch. 31, sec. 56, allows costs to be levied by distress, and in default imposes imprisonment with or without hard labour, not exceeding a month. By sec. 59, when a distress would be ruinous to a defendant, the Justice may commit him to imprisonment with hard labour, as if no distress could be levied. By sec. 62, where no distress can be levied, &c., a warrant may be issued to imprison defendant, or to imprison him and keep him to hard labour in the manner and for the time directed by the Act or law on which the conviction was had, &c., &c.

By the last Municipal Act passed before confederation (29 & 30 Vic., ch. 51, sec. 246), municipal councils could pass by-laws for inflicting fines up to \$50 for breach of the by-laws of corporations, and imprisonment with or without hard labour in gaol in default of payment, or levy by distress.

It is urged forcibly by Mr. Hodgins that, with the general legislation as to imprisonment at the time of confederation, with power held by the municipalities to award imprisonment with hard labour in default of payment of the penalty for violation of their by-laws, we must consider that the Local Legislature, under the general authority to punish by imprisonment in cognate matters, must be held to be able to award hard labour.

The words of the British North America Act are that they may exclusively make laws in relation to "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province in relation to any matter coming within any of the classes of subjects enumerated in this section."

Could it have been intended that the legislative body which had plenary authority to alter, modify, or abolish municipal institutions, could not legislate on purely municipal matters, such as tavern licenses, with at least as large power of enforcing their decrees as the municipal bodies enjoyed to enforce their by-laws on similar subjects?

On the other hand, we are pressed by the consideration that words conferring authority to punish in any specified manner must be construed with reasonable strictness, and that great caution is required in extending the meaning of such words beyond their ordinary legal significance.

It is to be carefully considered what the punishment for selling liquor without license was at the time the Imperial Parliament gave the foregoing powers to the legislative body they were creating.

The Act of 1866 seems to have been the then existing law, 29 & 30 Vic., ch. 51.

After giving the general power to municipalities to inflict fines for infraction of their by-laws, it legislates expressly on tavern licenses, providing for the passing of by-laws regulating the mode of granting, the number, security, &c., and the amount to be paid, &c.

Sec. 254 begins by requiring every tavern keeper to exhibit his sign, &c., under a penalty of \$1, &c., and proceeds, "But no person shall sell or barter intoxicating liquor of any kind without the license therefor by law required, under a penalty of not less than \$20 and costs, and not over \$50 and costs." This is the only penalty we find in the act for selling without license.

Sec. 256 enacts that all prosecutions for penalties for selling without license shall be recoverable, &c.

Then follow heavy penalties of fine or imprisonment with hard labour, for selling between Saturday night and Monday morning.

Sec. 260 declares that all penalties shall be paid in certain proportions, be levied by distress, and in default thereof imprisonment (merely), not exceeding thirty days.

So that under this Act there was no award of imprison-

ment *with hard labour* in default of payment of the money penalty for selling without license, nor any power to impose imprisonment directly for selling without license.

Under the general power to the municipalities in the same effect it does not appear that there was any authority to impose imprisonment directly for breach of a by-law; the imprisonment was only "in case of non-payment of the fine inflicted for any such breach, and there being no distress found," except in certain cases in cities, and in the suppression of houses of ill-fame: 29 & 30 Vic. ch. 51, sec. 246, sub-sec. 8.

It appears then that at Confederation imprisonment as a direct punishment could not be awarded for selling liquor without license.

The Local Legislature has the right to say that selling without license can be directly punished by imprisonment, and to provide for second or repeated violations of their rules. But as it is thus the exercise of a new power, must we not hold that nothing beyond the legal meaning of "imprisonment" can be intended?

If at Confederation we found the municipalities had the power to award imprisonment with hard labour as a direct punishment for infractions of by-laws, I would strongly incline to the opinion that by reasonable intendment and implication of law the Legislature, who had complete control over their existence, and who could hand over to them the disposition of such police or municipal matters as the licensing and regulation of saloons, must have at least as large a power of dealing with the punishment of "imprisonment."

We must remember that this is a matter either criminal or in the nature of a criminal charge, involving a restraint of personal liberty and corporal punishment; that our local Legislature has no general or plenary power of legislating on Criminal Law or *quasi* criminal matters involving corporal punishment, but only the restricted and limited jurisdiction allowed by the Confederation Act; and in

such a case it seems to us that such a power so given must be exercised with reasonable exactness.

Speaking for myself, I very much regret being obliged to come to this conclusion, as in the present state of the law on this subject it seems to me somewhat unfortunate that the Legislature of Ontario should not have such a power for the punishment of offences so difficult to deal with as breaches of the license laws.

ARMOUR and CAMERON, JJ., concurred.

Conviction quashed.

SMITH V. JOHN KEOWN AND CATHERINE BAMFORD.

Statute of Limitations—Tenancy at will—Entry—New trial.

An entry upon land under assertion of right and a verbal submission by the occupant, and consent to remain as tenant to the owner, create a new tenancy at will, and give a fresh point of departure under the Statute of Limitations.

Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises, a new trial was granted.

EJECTMENT.

Plaintiff claimed as assignee through grantee of the Crown.

Defendants denied plaintiff's title, and claimed by length of possession.

The case was heard at Cobourg, before Galt, J., and a jury.

The plaintiff lived in Scotland, and one Cockburn was his agent here.

The property, of which defendants occupied a part, was sold under decree of the Court of Chancery in 1865 or 1866, to one Pentland, and a vesting order was granted in March, 1871.

Defendant Bamford was then in possession and, according to Pentland's evidence, continued to pay rent to him as owner, the last payment, he said, being six years ago.

Pentland mortgaged the property to the plaintiff in 1867.

In September, 1873, his equity of redemption was sold by the sheriff to plaintiff, whose paper title seemed clear.

This action was brought on 2nd August, 1879.

Defendant denied having ever paid any rent to Pentland.

Evidence was given that Cockburn and Pentland went to the place, at all events, within five or six years ago. Cockburn said he told defendant that he represented plaintiff and that she must pay her rent to him, to which she assented. He went to take over the property from Pentland, and the latter then gave him formal possession.

Cockburn was afterwards again there with a builder (Bond) about putting up some buildings, and Bond marked out the ground.

It did not appear very clearly whether Cockburn was actually on the small piece claimed by defendant. He said he was not inside the house, but on the premises. Defendant only claimed a small part. He (Cockburn) spoke to her at the door of the house.

Pentland swore distinctly that they were on the part claimed by her.

She denied having made any admission to Cockburn, or promise to pay rent.

The learned Judge said the only question was, did she ever become tenant to Pentland, and, if so, at what time, and did she pay rent to him at any time within ten years of the commencement of this suit? If she did, the plaintiff should recover.

He told the jury that a verbal admission made to Cockburn, as stated by him, was not sufficient as an admission of title, because such admission must be in writing.

The jury found for defendant.

May 17, 1881. *Sidney Smith*, Q.C., obtained a rule *nisi* for a new trial, on the law and evidence, and on the ground of misdirection in telling the jury that they need not consider the evidence of the witness Cockburn, who swore that the defendant Bamford had admitted that witness's principal

(Smith) was the owner of the land, and that she would thereafter be his tenant: that the jury need not consider this evidence, inasmuch as, not being in writing, it did not in any way bind or affect the defendant, the defendant and Cockburn not being on the property in question at the time the conversation took place: that any acknowledgment or admission of title, in order to bind the person making it, must be on the property in question or in writing.

May 26, 1881. *J. W. Kerr* shewed cause, contending that such admissions or acknowledgments of title by the defendant were binding on her, though not in writing nor made on the property in question.

Sidney Smith, Q.C., contra. There was misdirection in this, that Mr. Cockburn's evidence shews that, after the sheriff's sale in 1873, Pentland, the mortgagor and execution debtor, went with him to the premises, and then defendant agreed to hold under plaintiff, Mr. Cockburn being his agent and attorney, and thenceforth pay rent for the property. Mr. Pentland swears they were in the house; Mr. Cockburn that the conversation that took place with defendant was at her door, which must have been on the property, as the house stands on the middle of the lot, and defendant herself swears that, after conversation between her and Mr. Cockburn, he just walked out of the house. The learned Judge directed the jury that they must not consider Mr. Cockburn's evidence at all, as the admission he proved was not in writing. Objection was taken to this by plaintiff's counsel, as he had in his address told the jury that the Judge would direct them that if they believed Mr. Cockburn's evidence they must find for the plaintiff. Moreover, the evidence shewed plaintiff to be mortgagee of the premises, and having purchased the equity of redemption in 1873, there was no bar by the Statute of Limitations, and defendant had no defence whatever to the action.

The learned counsel was stopped by the Court, as it appeared the charge should have been guarded, and the jury told to consider whether Cockburn made an entry as he described: *Cooper v. Hamilton*, 45 U. C. R. 502.

June 25, 1881. HAGARTY, C. J.—We think this verdict must be set aside. It does not appear that the Judge's attention, or that of the jury, was specially called to the point whether Cockburn and Pentland were or were not actually on the premises defended for. It was pressed on him, however, that what took place was evidence of a new tenancy.

If the admissions sworn to by Cockburn and Pentland were made while Cockburn was on the premises claiming for the owner, the case seems to come within our late decision of *Cooper v. Hamilton*, 45 U. C. R. 502; an entry under assertion of right, and a submission by the occupant, and consent to remain as tenant to the owner creating, as it were, a new tenancy at will, and giving a fresh point of departure under the Statute of Limitations.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute for new trial, without costs.

BAILLIE V. DICKSON.

Promissory note—Notice of dishonour—Sufficiency of.

A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was endorser. The notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville P. O.," *i. e.*, Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville Post Office. There was proved to be a Belleville in New Brunswick. Other notes, with defendant's endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his letters from the post office, were not called. The notice to another endorser, addressed to "Belleville P. O.," was received by him.

Held, (CAMERON, J., dissenting), that if the imitation of the defendant's signature put upon the notice addressed to Belleville was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But

Held, (ARMOUR, J., dissenting), that, upon the facts in evidence, there should be a new trial.

Per ARMOUR, J.—The Court were justified in inferring that the imitation of defendant's signature in the address was as good as the imitation of it in the protest, and that if it came to the Belleville post-office so addressed it would have been delivered to him; and the plaintiff was entitled to the verdict.

Per CAMERON, J.—The illegibility of the address made the notice insufficient.

DECLARATION: First count on a promissory note for \$500, dated April 8th, 1878, made by John H. Holden, payable three months after date, to the order of John Sutherland, and by him endorsed to the defendant, who endorsed it to the plaintiff, alleging presentment, dishonour, and notice.

Second count on a promissory note for \$500, dated July 6th, 1878, made by John H. Holden, payable three months after date, to the order of John Sutherland, and by him endorsed to the defendant, who endorsed it to the plaintiff, alleging presentment, dishonour, and notice.

Third count on a promissory note for \$500, dated February 1st, 1879, made by John H. Holden, payable four months after the date thereof, at the Bank of Montreal in Montreal, to the order of John Sutherland, and by him endorsed to the defendant, who endorsed it to the plaintiff, alleging presentment, dishonour, and notice.

Fourth count on a promissory note for \$70.62, dated February 1st, 1879, made by John H. Holden, payable two months after date, at the Bank of Montreal in Montreal, to the order of John Sutherland, and by him endorsed to the defendant, who endorsed it to the plaintiff, alleging presentment, dishonour, and notice.

Pleas—first, to first count: Payment and satisfaction by the maker of the note therein mentioned before suit.

Second, to second count: Payment and satisfaction by the maker of the note therein mentioned before suit.

Third, to third count: Payment and satisfaction by the maker of the note therein mentioned before suit.

Fourth, to third count: That defendant had not due notice of the alleged presentment and dishonour.

Fifth, to fourth count: Payment and satisfaction by the defendant before action.

Issue.

The cause was tried by Galt, J., at the last winter Assizes at Toronto, when it appeared that the note sued for in the second count was a renewal of that sued for in the first count: that the note sued for in the third count was a renewal of that sued for in the second count: and that the note sued for in the fourth count was for arrears of interest upon the note sued for in the second count, and for discount upon the note sued for in the third count; and the contention at the trial was, that the note sued for in the first count was satisfied by the taking of the note sued for in the second count, and that the note sued for in the second count was satisfied by the taking of the note sued for in the third count, and that the defendant was discharged from liability upon the note sued for in the third count, by reason of his not having had due notice, as was alleged, of the presentment and dishonour thereof.

The several notes sued for were put in, with the protests attached to each for nonpayment thereof, and the making and endorsing thereof were admitted.

The notary public in Montreal, who presented and protested the note sued for in the third count, was called as a

witness and stated in effect that he received this note from the plaintiff for protest, who told him where the endorsers resided, but did not tell him their names: that he duly presented it for payment, and protested it: that he was unable to read the defendant's signature on the back of the note: that he sent to the plaintiff's office to find out what it was, but neither the plaintiff nor his clerk was there, and so he made an imitation of it, and inserted imitations of it in the protest: that he enclosed a notice of the presentment and dishonour in an envelope, and putting upon the envelope an imitation of the defendant's signature on the back of the note, addressed it Belleville P. O., meaning thereby Province of Ontario, and posted it himself at Montreal, and had never received it back from the dead letter office.

The defendant was called as a witness on his own behalf. The material part of his examination was as follows: "I am a lawyer practising in Belleville." Q. "And I suppose a regular attendant at the post-office, either by yourself or through messenger?" A. "Yes. I never received a notice of protest of that \$500 note." Q. How long was it after the note fell due before you learned it had not been paid by the maker or by the prior endorser?" A. "A long time, two or three months, perhaps more nearly four months, from my letter-book."

Cross-examination.—"I had three clerks at the least at the time this last note became due. I did not always go to the post-office myself. As a rule my morning letters, which would include, as a rule, that mail, were taken out by one of my clerks. I did not go to the office nearly so often as my clerks."

Re-examination.—"It is the custom in my office that when the letters are taken out by the clerks, they are all put upon my desk for me to read. My attention at this particular time was called to this note because I was anxious to see that it would be paid, and my mind was alive about the time the note was maturing to see that it was not protested, so that I was watching every day. My

letters are also filed away in monthly packages, and I have since searched carefully so as to confirm my recollection of it, to see whether or not it was there; and I find furthermore, on consulting a diary that I keep, that I was at home on the 5th and 6th. I am quite sure I got the notice of protest of the note of \$70."

A clerk in the Toronto post-office was called, who stated that there were only two post-offices in the Dominion called Belleville, that he knew of, in 1879: that one was in New Brunswick: that he did not know as a matter of fact that in June, 1879, this post-office of the name of Belleville existed in New Brunswick; and said, "I only know now from the postal guide that there is one existing." He also stated that he would take "Belleville P. O." to mean Belleville Post Office.

The learned Judge found as follows: "I find that the two notes sued for in the third and fourth counts were given in satisfaction of the original indebtedness, and that Mr. Dickson did not receive notice of the dishonour of the \$500 note. I find that considering the notary had been in possession of another note which had been protested by him previously to this note, and which was endorsed by Mr. Dickson in the same manner as the \$500 note is endorsed, he did not give proper notice of protest to Mr. Dickson, by putting a notice in the post-office addressed in the manner in which he says it was, and which he calls in *fac simile*: a protest so addressed would be very unlikely to reach Mr. Dickson. I think it was his duty to have applied to his principal to ascertain Mr. Dickson's name if he could not read it.

I therefore find a verdict for the defendant on the first, second, and third counts of the declaration; and I find a verdict for the plaintiffs, on the fourth count, for the sum of \$65. I find that there was the sum of \$200 paid on account of the note sued for in the third count; and if the Court should be of opinion that I am wrong with regard to the note having been taken in satisfaction, so that the plaintiff is at liberty to fall back on the note which had

been properly protested; that the \$200, and the further sum of \$52, should be deducted from that note, the \$52 being part of the \$62, which was paid in the insolvency."

February 9, 1881. *Bethune*, Q. C., obtained a rule *nisi* to increase the verdict by the last \$500 note, and interest and protest fees, or by the next earliest \$500, interest and fees, because the notice of protest of the last of said \$500 notes was properly given; and, at all events, the said other \$500 note was not satisfied by the giving of the last \$500 note.

May 21, 1871. *Ferguson*, Q. C., shewed cause, contending that the law was in favour of defendant, and arguing, amongst other things, that an endorser without notice is off not only his liability on the note, but also his liability on the consideration for which it was given. He cited *Daniell* on Negotiable Instruments, 2nd ed., p. 30, sec. 971; *Parsons* on Notes and Bills, I. 329, II. 183; *Chitty* on Bills, Amer. ed, 488, and *Bridges v. Berry*, 3 Taunt. 130, referred to in all these books.

February 9, 1881. *Bethune*, Q. C., contra, referred to *Story* on Promissory Notes, 7th ed., sec. 104.

June 25, 1881. ARMOUR, J.—In determining the matter in controversy as to the notice of dishonour, the following questions present themselves for our determination:—

1st. Was the address, "Belleville P. O.," a sufficient address to reasonably ensure the despatch of the notice to and its arrival at the post-office in Belleville, in the Province of Ontario? If so,

2nd. Was the imitation of the defendant's signature put upon the notice a sufficiently good imitation of it to reasonably ensure the delivery of the notice after its arrival at the post-office in Belleville, in the Province of Ontario, to the defendant? And if so,

3rd. Was it sufficiently shewn by the defendant that the said notice had not been so delivered?

4th. If the imitation of the defendant's signature put

upon the notice was not a sufficiently good imitation of it to reasonably ensure the delivery of the notice after its arrival at the post-office in Belleville, in the Province of Ontario, to the defendant, is the defendant discharged from his liability upon the note?

Considering the relative situations of the city of Belleville, in the Province of Ontario, and of the city of Montreal, the means of communication, postal and otherwise, between them, their commercial intercourse and transactions, and the necessarily large amount of correspondence constantly passing to and fro between them, I have no doubt that a letter posted in the latter city, and addressed Belleville P. O., would be immediately despatched to and would arrive at the post-office in the former city in due course, and I think that the suggestion that a letter so addressed would go to Belleville, New Brunswick, has but little, if any, foundation. In proof of this the notice addressed to the other endorser, Belleville P. O., was received by him, and the defendant received in due course notice of dishonour of the note sued for in the fourth count, addressed Belleville P. O.

I think, therefore, that the first question ought to be answered in the affirmative.

If the imitation of the defendant's signature put upon the notice, and addressed Belleville P. O., was an exact imitation of the defendant's signature on the back of the note, and such notice was duly posted in Montreal, I think that, of itself, would have been a sufficient notice to the defendant whether such notice ever reached its destination or not.

But if the imitation of the defendant's signature put upon the notice was not an exact imitation of the defendant's signature, I think we are justified in inferring that it was as good an imitation of it as those imitations of it which were put in the protest.

The defendant is a lawyer in large practice in the city of Belleville, in all probability constantly doing business at the post-office, perhaps keeping an account at it, and

paying it from time to time with his cheques, receiving constantly, no doubt, registered letters requiring his signature for their receipt; and I do not think it unfair to infer that his signature was well known to those employed in the post-office, and that if a letter had come to that post-office bearing as its address such an imitation of his signature as we find in the protest, such a letter would have been delivered to him.

The second question, I think, ought also to be answered in the affirmative.

I do not think that the defendant sufficiently showed that the notice had not been delivered. He had three clerks at the time the notice was sent, and as a rule his morning letters, which would include this notice, were taken out by one of his clerks, but none of these clerks were called as witnesses.

The views I have already expressed render it unnecessary for me to express any opinion as to the fourth question; but I shall refer to the case of *Hewitt v. Thomson*, 1 Moo. & Rob. 543, as having an important bearing upon it.

It was an action against the drawer of a bill dated No. 3 Wilton street, 30th November, 1835, purporting to be drawn by Charles Thomson, on and accepted by John Johnson. When the bill was returned unpaid to the plaintiff, who was an endorser upon it, on March 7th, 1836, his attorneys wrote a letter containing notice of its dishonour, and put it in the two penny post, but, misreading the drawers surname "Thornton," instead of "Thomson," they directed their letter to C. Thornton, Esq., No. 3 Wilton street. The defendant had ceased to reside at that place before the bill became due, and the letter was returned to the attorneys on March 10th, from the dead letter office, with an intimation that no such person as Mr. Thornton was known at No. 3 Wilton street; whereupon the attorneys, on the same day, having made enquiries who the defendant was, and having ascertained his present residence, addressed a notice to him in his right name at that residence.

The Reporter says: "Parke, B., told the jury that it was clear the defendant had not received notice within the time limited by the ordinary rule, and that it was fit they should watch very closely any evidence adduced for the purpose of taking any particular case out of that rule. The notice ought to have been given on the 7th. In fact it did not reach the defendant till the 10th, and the question for the jury was, whether sending the letter on the 7th to the residence occupied by the defendant when the bill was drawn by him, and with the error that had been proved to exist in the defendant's name upon the address of the letter, was a sufficient notice. They would look at the bill and examine the defendant's signature thereto, and then say whether the mistake in the address was attributable to the want of proper care on the part of the plaintiff or his attorneys; or whether it might more reasonably be said to result from the defendant's own manner of writing his name on the bill. If they were of the latter opinion, their verdict would be for the plaintiff;" and the jury so found.

In my opinion the verdict should be entered for the plaintiff upon the third count, for the amount of the note sued for in that count, less the sums admitted to have been paid thereon; that the verdict already found should stand upon the fourth count, and that the verdict should be entered for the defendant on the first and second counts.

HAGARTY, C. J., stated that he agreed with the legal propositions of Armour, J., but differed as to the result, considering that there ought to be a new trial.

CAMERON, J., agreed with Hagarty, C. J., in granting a new trial, but dissented as to the sufficiency of the notice, holding the opinion that under the statute 37 Vic. ch. 47, D., a notice of dishonour, to be well given, must be addressed to the indorser, and if the indorser writes an illegible signature, so that those unfamiliar with it could not make it out, a notice containing a *fac simile* of such signature

would not be sufficiently addressed to him any more than it would be if the endorser had merely made his mark or cross, and the notice marked had on it no more than the cross and the place of residence of the endorser; but as further evidence might be obtained, he concurred in the view of the Chief Justice, that there should be a new trial.

New trial, without costs.

REGINA EX REL. GRANT V. COLEMAN.

Quo warranto—Municipal election—Jurisdiction of C. C. Judge.

A County Court Judge directed the issue of writs of *quo warranto*, returnable before himself, to test the validity of a municipal election, but before appearance set aside all proceedings for irregularity with costs, on exceptions to the writs taken before him.

Held, CAMERON, J., dissenting, affirming the judgment of HAGARTY, C.J., that he had power so to do.

THIS was an appeal from an order of Hagarty, C. J., 8 Prac. R. 497.

Ogden, for the appeal. The only power conferred on a County Court Judge is that contained in R. S. O. ch. 174, secs. 179 to 200, and under none of these has he power to interfere with a Superior Court case except simply to grant his fiat for the writ, add parties, and try the validity of the election. If any other powers are conferred they are strictly limited to the carrying out of those objects, and do not enable him to make any order other than what will enforce the decision when arrived at in the regular way. A County Court Judge, being Judge of an inferior Court, has not power to do anything except what is specially and distinctly conferred by statute. This is the principle which governs in prohibition matters. The fact that the Legislature has by ch. 50 sec. 36 given a

County Court Judge power to rescind his own order for a *capias* in Superior Court cases, shews conclusively that the Legislature knew he had not such power otherwise. Special powers in superior cases to make fiats for replevin writs, and orders to examine and hear motions under certain limited circumstances, also sustain this view. In *quo warranto* matters the writ is issued on a fiat which is transmitted into the office of the Clerk of the Superior Court, and by sec. 181, where oral evidence is taken, it must be returned to the Court whence the writ issued. It is said that the County Court Judge, as *persona designata*, becomes seised of the matter immediately upon issue of the writ; but this cannot be, as it appears by sec. 179 that the matter may be before the Senior or Officiating Judge of the County Court, thus shewing that upon its return the matter may be dealt with by any County Court Judge officiating at the time. By sec. 200 the Superior Court Judges alone have power to make rules to govern the issuing, service, and execution of the writs, and respecting the practice generally. And we find the rules so provided show that the practice is governed by Superior Court Judges. (See Rule 16.) As to the grounds on which the learned County Court Judge quashed the proceedings, it is submitted that there was no substantial defect, and any defect apparent could have been amended under the A. J. Act and the Municipal Rules. (See Rule 18.) This Court would amend matters of that nature. The objection that the writ did not disclose the ward of the city for which defendant had been elected was not fatal, as the affidavits of the relator disclosed it, and in fact the defendant's affidavit in answer cured it by shewing the particular ward. The defendant is alderman of the city, and not of a particular ward, as shewn by his declaration of office. Upon the order made by the County Court Judge execution has been issued, and it is contended by the relator that no power to do this is conferred, and the order should be revoked or proceedings stayed, and a *mandamus* issued for the trial of the validity of the election. See *High on Extraordinary Remedies*, sec. 151.

Aylesworth, contra. The jurisdiction of the Courts in *quo warranto* is wholly statutory. The statute R. S. O. ch. 174, sec. 179, confers upon the County Court Judge precisely the same jurisdiction as is given to a Superior Court Judge, the sole difference being, that the jurisdiction of the one extends only to elections had in his own county, while that of the other extends over the whole Province. The proceedings during their progress are in no sense in the nature of causes *In the Queen's Bench*: see sec. 199,—“return the writ, &c., into the Court;” and sec. 204,—“cases pending in such County Court”—and form of writ of *quo warranto* summons prescribed by the rules, which does not command an appearance “in our Court of Queen's Bench” as an ordinary writ of summons, but before a certain Judge. The Judge before the writ is returnable has complete and sole jurisdiction over all proceedings connected with it. The relator is in any case not entitled to a *mandamus*, as no sufficient demand to proceed to a determination of the matter on the merits was made. It appears, on the contrary, that the relator expressly refused to file the writ of *quo warranto*, or to leave it with the Judge, and until that was done the County Court Judge could not be required to try the case.

June 25, 1881. ARMOUR, J.—I am of the opinion that the order of the learned Chief Justice of this Court was rightly made, and I fully agree in the judgment delivered by him on making the order.

I have also had the opportunity of reading the judgment on the same point delivered yesterday by the Chief Justice of the Court of Common Pleas in *Regina ex rel. Dwyer v. Lewis (a)*, sustaining the judgment of the Chief Justice of this Court. I do not think that I can usefully add anything to what they have said.

I think the rule should be discharged, with costs.

(a) 32 C. P., p. 104.

CAMERON, J.—I concur in the conclusion arrived at by my learned brothers, that the rule must be discharged as far as it asks for a mandamus to the learned Judge of the County Court of the county of Carlton, commanding him to hear the matter on the *quo warranto* summons, as the writ was not properly brought before him, or any proper request made to him to proceed to hear the case upon the merits. But I find myself compelled to dissent from the conclusion that the rule as a whole should be discharged, and think that it ought to be made absolute to stay all proceedings for the enforcement of the order made by the learned County Court Judge by the process of this Court. In differing from the majority of the Court, I must necessarily feel that the view I take may be erroneous, but I am bound to exercise my own judgment upon the question, and upon the best consideration I have been able to give the matter, it appears to me that the learned County Judge had no power or authority to make the order setting aside the writ of summons issued out of this Court, and that his order was consequently void. My reasons for this conclusion are, that the power of the Judge in relation to *quo warranto* proceedings is purely the creation of the statute, and is in no manner incident to his office apart from the statute. The statute defines in terms what he may do in common with the Judges of the Superior Courts.

By section 180 of R. S. O., ch. 174, it is provided, "If the relator * * shews by affidavit to any such Judge reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected, and if the relator enters into a recognizance before the Judge, or before a commissioner for taking affidavits, in the sum of \$200, with two sureties, to be allowed as sufficient by the Judge upon affidavit of justification, in the sum of \$100 each, conditioned to prosecute the writ with effect, or to pay the party against whom the same is brought any costs which may be adjudged to him against the relator, the Judge shall direct

a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested."

By section 189 : "The Judge shall, in a summary manner, upon statement and answer, without formal pleadings, hear and determine the validity of the election."

By section 199 : "The decision of the Judge shall be final, and he shall immediately after his judgment return the writ and judgment, with all things had before him touching the same, into the Court from which the writ issued, there to remain of record as a judgment of the said Court; and he shall, as occasion requires, enforce such judgment by a writ in the nature of a writ of peremptory *mandamus*, and by writs of execution for the costs awarded."

By rule 18 of the rules made in pursuance of the Act by the Judges of the Queen's Bench and Common pleas, "None of the proceedings which shall be had in any case for trying the validity of any election, or which shall follow the determination thereof, shall be set aside or held void on account of any irregularity or defect which shall not, in the opinion of the Court or Judge before whom the objection is made, be deemed such as to interfere with the just trial and adjudication of the case upon its merits."

By the terms of the writ the respondent was commanded to appear before the Judge on the eighth day after he should be served with the writ, then and there to answer and shew to such Judge by what authority he claimed to use, exercise or enjoy the office of alderman for the city of Ottawa, * * and further to do and receive all those things which the said Judge should thereupon order concerning the premises.

This writ issued under the seal of the Court of Queen's Bench, and was tested in the name of the Chief Justice. Nowhere in the statute or rules of Court is the Judge authorized in terms to take any step or proceeding before the return of the writ; and I cannot see that before that time the matter was in any way before him. It having been made to appear to him that there were "reasonable

grounds for supposing that the election was not legal," &c., * * and the relator having entered into the recognizance required, it was imperative upon him to direct the writ to be issued to try the matters contested, and having directed the writ to be issued, he was *functus officio* till the case was brought before him upon the return of the writ, and then it was not open to him to set it aside for any objection, under rule 18, for any defect or irregularity that did not interfere, in his judgment, with the just trial and adjudication of the case on the merits, as his judgment on the merits would not be open to review by this Court. I concede if he had on the return of the writ before him held that a defect in the recognizance interfered with a just trial on the merits, however absurd that might appear, his so finding in favour of the respondent would be a final adjudication that could not be impeached, and would have prevented an actual trial on the merits as effectually as the so to speak interlocutory decision that is complained of.

The difference is just this, that he would at the proper time in that case have given his judgment, and he would then have been the sole judge of the sufficiency of his reasons for the conclusion he arrived at. But as he was exercising a summary jurisdiction under a special statute, he was bound to exercise it in the way and at the time indicated by the statute.

In *Chitty's General Practice of the Law*, vol. 2, page 327, the law is thus briefly stated: "In general in every summary proceeding founded on a statute, the direction of the Act must be very strictly pursued;" and the following authorities are referred to in support of the position: *Jones v. Fitzaddam*, 3 Tyr. 904; *Baynes v. Baynes*, 9 Ves. Jr. 462; *Shaw v. Roberts*, 2 Dowl. 25.

In *Baynes v. Baynes*, which was an application under 40 Geo. III., ch. 56, to prevent the necessity of suffering a recovery by a tenant in tail, Lord Eldon said: "In all these Acts they say the application must be by petition; the party cannot apply by motion. A rule laid down by the Court itself, prescribing the mode of acting upon

petition, the Court itself may dispense with ; but where an Act of Parliament has directed the application to be by petition, the Court has no jurisdiction except in the mode prescribed."

The principle of that decision applies in the present case. Moreover, the writ set aside was the process of this Court over which the County Court Judge could exercise no judicial control, and setting it aside was an authorized interference with the process of another Court. It is unnecessary to determine on the rule in this case whether a Judge of the Queen's Bench, by virtue of the control the Court can exercise over all its processes, could set the writ aside for any irregularity that might exist in it or the preliminary proceedings to obtain it. The learned County Court Judge has, however, set it aside for irregularity, and with costs, which, it seems to me, was clearly in excess of his jurisdiction ; and while I do not think this Court has any power to set aside his order, I believe it has the power, and should interfere by its rule, to prevent an illegal decision being enforced through its process, and therefore the rule should be absolute to stay proceedings on the writ of execution issued from the Court for the recovery of the costs. I would also refer to *Regina ex rel. Arnott v. Marchant*, 2 Cham. R. 167, as favouring the conclusion I have arrived at, where Burns, J., held under the Municipal Law then in force, 12 Vic. ch. 81, and 13 & 14 Vic. ch. 64, that there was no power to award costs before the final disposition of the case upon the merits. I do not in any way attempt to question the decision of the County Court Judge if he had power to deal with the question, as to do so would be quite as grave an assumption of power as he has committed, if my view be right.

HAGARTY, C. J., remained of the opinion expressed by him in Chambers.

Rule discharged, with costs.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

GEORGE BELL, JOHN O'MEARA, CHARLES HENRY CONNOR, GEORGE MACDONALD, JOHN BIRNIE, JR., CHARLES EGERTON MACDONALD, HOWARD JENNINGS DUNCAN, STEWART CAMPBELL JOHNSTONE, LENDRUM McMEANS, WILLIAM BOSTON TOWERS, FRANCIS EDWIN GALBRAITH, CHARLES WRIGHT, JOHN KELLEY DOWLEY, CHARLES HERBERT ALLEN, CHARLES ELWIN RADCLIFFE, JAMES LELLAND DARLING, JOHN CLARKE ECCLES, GEORGE WILLIAM BAKER, HEDLEY VICARS KNIGHT, GEORGE RITCHIE.

SITTINGS IN VACATION, AFTER EASTER TERM.

IN RE ALBEMARLE AND EASTNOR.

Separation of townships—Arbitration—Omission to take and file notes of evidence—R. S. O. ch. 174, secs. 383, 385.

The provisions of sec. 383 of the Municipal Act requiring arbitrators to take and file for the information of the Court full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by themselves, or upon a view, in making their award, are imperative, and the omission to comply with them is fatal to the award.

From reading the award made in this matter, and the evidence and documents filed, it was impossible for the Court to ascertain the reason for the award, and so impossible to consider the matter upon the merits as required by sec. 385; and the evidence and documents which were filed appeared not to support the award, which was therefore set aside. The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the Court refused to refer the matter back to them, but ordered that it be remitted to the Judge of the County Court, unless counsel could agree upon such facts as would enable the Court to deal with the matters in dispute.

February 18, 1880. *Falconbridge* obtained a rule *nisi*,—upon reading the rule made in this matter, on the 23rd March previously, referring back to the arbitrators appointed in the matter of the arbitration herein, to make an amended award, and a copy of the evidence taken by the said arbitrators on the said reference back, and the award made on the 24th December following, by Robert Graham and James Grier, two of the three arbitrators, and the affidavits of Charles Whicher and Thomas S. Campbell that day filed; and upon reading the affidavits and papers filed on two previous applications, theretofore made in the above matter, to set aside two former awards made herein by the said arbitrators—calling upon the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds

to shew cause why the said award, made 24th December, 1880, by Robert Graham and James Grier, two of the said three arbitrators, should not be set aside, with costs to be paid by the said corporation of Eastnor, Lindsay, and St. Edmunds, on the ground that in arriving at their award said arbitrators improperly charged to said corporation of Eastnor, Lindsay, and St. Edmunds, as the portion of the debt payable by said united townships to the county of Bruce, a much smaller sum than that of \$1,062, whereas upon the evidence taken before said arbitrators upon the original reference to them, and afterwards upon the two references back to them of said matter, said sum of \$1,062 was the only sum that could properly be found to be the portion of such county debt payable by said united townships; or that at all events, in arriving at said award, said arbitrators improperly charged against said united townships, in respect of said indebtedness, a much smaller sum than that which upon said evidence was the portion of such debt properly chargeable against said townships; and on the further ground that said award, made on the 24th day of December last, was bad for want of finality, in that it made no provision as to which of the said two corporations should bear and pay the indebtedness to the county of Bruce, due from the union formerly subsisting between said two corporations, and made no provision whatever for payment of said indebtedness to the county; and on the further ground, that in arriving at said award said arbitrators improperly allowed to said united townships, as their portion of the value of the real estate formerly belonging to the union between the said united townships and said township of Albemarle, the whole value of such real estate, instead of a portion thereof proportionate to the interest of said united townships in the said real estate prior to the dissolution of said union formerly existing; and on the ground that upon the merits appearing upon said evidence said award was manifestly unjust, and against the law and the evidence, and the weight of evidence; and why, upon the said evidence and

the proceedings before the arbitrators, the Court should not modify said award, and award such sum to be paid by the said united townships to said township of Albemarle, as the justice of the case required, with leave to said township of Albemarle, if necessary, to take off the files the affidavit of said Charles Whicher, with the papers thereto attached, and have the same re-sworn at any time before the final disposition of this application.

The facts were as follow :—

The corporation of the united townships of Albemarle, Eastnor, Lindsay, and St. Edmunds, theretofore existing, became on the 1st day of January, A.D. 1878, dissolved, and formed into two corporations; that of the township of Albemarle, and that of the united townships of Eastnor, Lindsay, and St. Edmunds. These two corporations being unable to agree “as to the disposition of the present property of the union, or as to the sum to be paid by the one to the other, or as to the times of payment thereof,” three arbitrators were appointed under the provisions of the Municipal Act to settle the matters in dispute, who made an award on the 28th day of May, 1878, directing the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds to pay to the corporation of the township of Albemarle the sum of \$882; \$441 thereof on or before the 1st day of January, 1879, and \$441 thereof on or before the 1st day of January, 1880, with interest on each instalment from the 1st day of January, 1878, awarding to each of themselves for his services the sum of \$60, and directing the same, and \$21.50 for other expenses, to be paid equally by the two corporations.

This award was, on the application of the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, by rule of this Court, made the 11th day of February, 1879, referred back to the arbitrators who made the said award, two of whom, on the 15th of April, 1879, made an award, directing that the corporation of the township of Albemarle should pay to the county treasurer

of the county of Bruce the sum of \$2,779.35, being the amount of debt due to the said county of Bruce by the united townships of Albemarle, Eastnor, Lindsay, and St. Edmunds, on the 1st day of January, 1878, and should also pay to the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, the sum of \$82.02, awarding to each of the three arbitrators the sum of \$140, and directing the same, and \$104.15 other expenses, to be paid equally by the two corporations, and further directing that the corporation of the township of Albemarle should pay all costs incurred in the Court of Queen's Bench in reference to this matter.

This last mentioned award was, on the application of the corporation of the township of Albemarle, by rule of this Court, made on the 23rd day of March, 1880, referred back to the arbitrators appointed in the matter of the said reference, to make an amended award, two of whom, but not the same two who made the said previous award, on the 24th day of December, 1880, made the following award:—

“IN RE ALBEMARLE V. EASTNOR ET AL.

“To all to whom these presents shall come, greeting:

“We, Robert Graham and James Grier, two of the arbitrators chosen to determine the matters in controversy between the above-named municipalities, in accordance with a judgment of the Court of Queen's Bench, do hereby make our award in writing, that is to say,—

“First. We do award and order that the township of Albemarle shall pay to the united townships of Eastnor, Lindsay, and St. Edmunds, the sum of (\$55) fifty-five dollars on or before the 1st day of February, 1881.

“In making this award, we have confined ourselves to the aforesaid judgment delivered by Hon. Mr. Justice Cameron, and having examined the matters referred to us, beg to state—

“(1) We find that each municipality has one scraper, which is a fair division between them.

"(2) In reference to the cemetery, we allow Eastnor *et al.* \$200 as their share.

"(3) In reference to county debt, after taking into account the rebate of 50 per cent. made by the county council, we find that the townships of Eastnor, Lindsay, and St. Edmunds, are indebted to Albemarle in the sum of \$145, making the account as follows:—

"Cemetery, Eastnor's share \$200 00

"County debt due Albemarle 145 00

"Leaving a balance due Eastnor ... \$55 00

"We also order that the arbitrators, Robert Graham, James Grier, and Thomas S. Campbell, be paid the sum of (\$50) fifty dollars each for their services as arbitrators in this matter, said sums to be paid as follows:—\$75 to be paid by the township of Albemarle, and the further sum of \$75 by the united townships of Eastnor, Lindsay, and St. Edmunds. We also order that the following sums be paid—one half to be paid by the township of Albemarle, and the remaining half by the townships of Eastnor, Lindsay, and St. Edmunds, that is to say,—

"W. J. Jolley\$17 10

"McMillan (stationer) 1 65

"C. W. Dalton 4 00

"R. Tackaberry 6 00

"David Scott 6 00

"John Whicher 2 45

"Charles Whicher 2 50

"J. Spence (use of room) 5 00

\$44 70

"In witness whereof we, the said Robert Graham and James Grier, have hereunto set our hands and affixed our seals to these presents."

The material part of Campbell's affidavit was, that the arbitrators who joined in the award took as the basis of settlement the county debt at a sum of \$1,200 or thereabouts, and that he believed the true sum was only \$860 or thereabouts.

June 3, 1881. *H. J. Scott*, shewed cause. The share of indebtedness to the county has been calculated on the basis of the former decisions in this matter. Albemarle cannot complain that the award does not direct which township should assume the county debt, inasmuch as Albemarle has to assume it. There is evidence of the value of some of the cemetery lots, and the arbitrators have fixed the share of Eastnor *et al.* therein on the basis of its increased present value, and not of its cost price.

Falconbridge, contra. The arbitrators profess to follow the judgment of Mr. Justice Cameron, in 45 U. C. R., 136; but neither on the principle there affirmed, nor on any other data supplied by the evidence, can the sum of \$145 be arrived at as the amount due Albemarle in respect of the county debt. It should be a much larger sum. Then, as to the share of the cemetery lot, the arbitrators have given Eastnor *et al.* credit for the whole value instead of a proportionate amount, based on the assessment of 1877. There is nothing in the evidence to shew that its present value is greater than the amount it cost, \$190.

The judgment of Cameron, J., in 45 U. C. R. 136, and the statutes and cases there cited, were referred to.

June 14, 1881. ARMOUR, J.—By R. S. O. ch. 174, sec. 383, it is enacted that “In the case of any award under this Act which does not require adoption by the council * * the arbitrator or arbitrators shall take and immediately after the making of the award shall file with the clerk of the council, for the inspection of all parties interested, full notes of the oral evidence given on the reference, and also all documentary evidence, or a copy thereof; and in case they proceed partly on a view or any knowledge or skill possessed by themselves, or any of them, they shall also put in writing a statement thereof sufficiently full to allow the Court to form a judgment of the weight which should be attached thereto.”

And by sec. 385 it is enacted that “Every award made under this Act shall be in writing, under the hands of all

or two of the arbitrators, and shall be subject to the jurisdiction of any of the Superior Courts of law or equity, as if made on a submission by a bond containing an agreement for making the submission a rule or order of such Court; and in the cases provided for by the 383rd section, the Court shall consider not only the legality of the award, but the merits as they appear from the proceedings so filed as aforesaid, and may call for additional evidence to be taken in any manner the Court directs, and may, either without taking such evidence or after taking such evidence, set aside the award, or remit the matters referred, or any of them, from time to time, to the consideration and determination of the same arbitrators, or to any other person or persons whom the Court may appoint, as prescribed in 'The Common Law Procedure Act,' and fix the time within which such further or new award shall be made; or the Court may itself increase or diminish the amount awarded, or otherwise modify the award as the justice of the case may seem to the Court to require."

In the matter of the arbitration between *The Corporation of the United Counties of Northumberland and Durham* and *The Corporation of the Town of Cobourg*, 20 U. C. R. 283, the arbitrators did not take or file any notes of the oral evidence given on the reference, nor of any documentary evidence, nor did they put in writing any statement; and the Court there said, "When the Legislature gave to the several Superior Courts power to consider not only the legality but the merits of such an award as this before us, they certainly intended that the evidence taken should be forthcoming, in order that any Court applied to might be able to form a judgment of the weight which should be attached thereto. It is not forthcoming because there is none such, but it does not necessarily follow that the award must be set aside on that account."

It is to be observed, as to this case, that it was not taken as a ground, in the rule *nisi* to set aside the award, that the arbitrators had not taken or filed any notes of the oral evidence given on the reference, nor any documentary

evidence, or a copy thereof, nor that they had not put in writing any statement; and the question for the determination of the Court was, whether the arbitrators had properly awarded with respect to a matter, the facts regarding which were fully before the Court.

In *re Township of Howick & Wroxeter*, 12 U. C. L. J. N. S. 64, Wilson, J., speaking of sec. 385, above quoted, said: "I think it is my duty under that enactment to enter into *the merits* of the matters submitted, and that I must deal with the award as the justice of the case may seem to the Court to require."

I think that the provisions of sec. 383 are imperative, and when arbitrators have, in making their award, proceeded upon oral evidence without taking full notes of it, or upon documentary evidence without taking it or a copy of it, or have proceeded partly on a view, or any knowledge or skill possessed by themselves or one of them, without putting in writing a statement thereof sufficiently full to allow the Court to form a judgment of the weight which should be attached thereto, such award must be set aside, for the Court cannot, in respect of such an award, perform the functions that it is by sec. 385 required to perform. Besides, every person interested in such an award is entitled to inspect and examine the evidence upon which such award was made.

The omission to file, as required by sec. 383, might perhaps not be fatal, for the Court could compel the filing; but the omission to take full notes of the oral evidence, the documentary evidence, or a copy of it, and to put in writing the statement, must, in my opinion, be fatal to the award.

I think also that where arbitrators have, in making their award, professed to comply with the requirements of sec. 383, and the evidence, documents, and statements, filed by them under the provisions of that section do not support such award, such award cannot stand.

In the case in hand the arbitrators do not profess to have acted either in whole or in part upon any view or any knowledge or skill possessed by themselves, or any of

them; on the contrary, in their affidavits filed on the application to set aside the second award, they expressly disclaimed having so acted.

By reading the award and the evidence, documents, and statements, filed in support of it, those interested in the award ought to be able to understand how, and for what reasons, and upon what grounds the arbitrators arrived at their award.

It is impossible for any one by reading this award, and the evidence and documents filed in support of it, to ascertain how, and for what reasons, and upon what grounds the arbitrators awarded that the corporation of the township of Albemarle should pay to the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, the sum of fifty-five dollars, and it is therefore impossible for the Court "to consider the merits as they appear from the proceedings so filed as aforesaid," and to deal with the award upon such proceedings "as the justice of the case may seem to the Court to require."

It appears from the award that one of the subject matters considered by the arbitrators, in making their award, was the "county debt" thus referred to therein: "In reference to county debt, after taking into account the rebate of fifty per cent. made by the County Council, we find that the townships of Eastnor, Lindsay, and St. Edmunds, are indebted to Albemarle in the sum of \$145."

All that appears in the evidence and documents filed on the subject of the "county debt," is the following minutes in the proceedings before the arbitrators on May 7, 1878: "Statement of Mr. Cooper, County Treasurer, read, shewing that the late united townships were indebted to county to the 31st December, 1877, in the sum of \$2,779.35."

The following letter was filed in the proceedings in the last arbitration:

"Treasurer's Office, Co. Bruce,
"Walkerton, 23rd Dec., 1879.

"J. H. WHICHER, Esq., Colpoys Bay.

"MY DEAR SIR,—Yours of the 18th inst., is to hand. I have not the minutes of council before me, nor am I quite

sure as to time at which the balance is to be struck. I should imagine, however, that it is to apply to the indebtedness as at the end of the year. In this event I am not able to state precisely the amount, as there is yet a week to end of year for collections. The indebtedness as at 31st December next, will be say \$2,875.44, as against which will be the non-resident taxes, amounting probably to about \$450 to \$500. At the latter figure this would leave say about \$2,400, of which fifty per cent. to be remitted would leave say \$1,200 due, in addition to which is the municipal equivalent in arrears to \$631, making a total indebtedness of over \$1,800 to be divided into four annual instalments of \$450, or thereabouts, each, with interest.

“Yours truly,

“JAMES G. COOPER,

“*Treasurer, Co. Bruce.*”

And the following evidence was given at the last arbitration by C. W. Dalton, the clerk of the united townships: “I have seen a certificate now in the hands of Mr. Whicher, signed by Mr. Cooper. This certificate contains a statement up to the year 1879. This document does not refer to Eastnor, Lindsay, and St. Edmunds. It is no answer at all.

* * When dissolution took place we tried to make a settlement with Albemarle, but could not. The reeve of Albemarle said they would settle on the basis of 1877, and Eastnor would be indebted to the county about \$1200, and Albemarle about \$1500. Eastnor wanted a statement of receipts and expenditures during the union, and that it should form the basis of settlement between the two municipalities. Statement from Cooper, January, 3rd, 1880. Cooper's writing to be put as evidence.”

The arbitrators in making their award should have made it in respect of the state of affairs between the disputing municipalities as it existed on the 1st day of January, 1878, the date of their dissolution.

At that time it appears that the debt of the theretofore united townships to the county was \$2779.35, and that by the last revised assessment rolls for the year 1877 the assessment of Albemarle was about \$50,000, and that of the townships of Eastnor, Lindsay, and St. Edmunds, was \$41,000.

If the proportion of this debt that each of the disputing municipalities ought to have paid had been fixed upon the basis of their assessment for the year 1877, the corporation of the township of Albemarle ought to have paid \$1527.11, and the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, ought to have paid \$1252.24.

I think the proper course for the arbitrators to have adopted would have been, to have stated what proportion of this debt should be payable by each of the disputing municipalities, or they might have stated that each of the disputing municipalities should pay such a proportion (stating it) of the then existing debt of the theretofore united townships to the county, without stating the amount of that debt, if there was any uncertainty about its amount.

There is nothing in the evidence and documents filed to shew the basis upon which the arbitrators fixed the amount of this debt payable by each, nor why the corporation of the united townships of Eastnor, Lindsay, and St. Edmunds, should be "indebted to Albemarle, in reference to county debt, in the sum of \$145 only," as would appear by the award.

It is stated upon affidavit used on this motion that the arbitrators took the debt of the former united townships to the county as being \$1,200, and it is suggested by counsel that they fixed the proportion of this payable by the united townships of Eastnor, Lindsay, and St. Edmunds, at \$500: that from this they deducted certain taxes received by Albemarle after the dissolution, amounting to \$355, leaving \$145, and then crediting to the said united townships the sum of \$200 in respect of the cemetery, arrived at \$55 as the sum due to them from Albemarle.

I do not think that the evidence warranted them in taking the debt to the county as being only \$1,200, and that if they did so the doing so was erroneous. Besides, this was clearly not the amount of the debt at the date of the dissolution, which debt at which date only was for their determination.

Then, as to the \$355 of taxes which it is alleged were collected by the township of Albemarle after the dissolution, and which, it is said, ought to be credited to the united townships, and which, it is said, was credited by the arbitrators.

It may be, that the united townships were entitled to credit for these taxes, and that the arbitrators properly credited the united townships with them; but the evidence and documents filed do not satisfy me that the united townships were entitled to credit for them, and that if the arbitrators did credit them to the united townships that they were right in so doing.

If these taxes were taxes on non-resident lands which had been returned to the county treasurer, the arbitrators had nothing to do with them, for the law provides that, "if two or more local municipalities, having been united for municipal purposes, are afterwards disunited, * * * the treasurer (of the county) shall make corresponding alterations in his books, so that arrears due on account of any parcel or lot of land at the date of the alteration shall be placed to the credit of the municipality within which the land, after such alteration, is situate." R. S. O., ch. 180, sec. 172.

If these taxes were taxes collected by the collector for the year 1877, but not collected till after the 1st day of January, 1878, the date of dissolution, it is not shewn in evidence that \$355 would be the share of the united townships of the taxes for the year 1877 remaining in the treasurer's hands after paying the liabilities of the theretofore existing union for the year 1877.

Then as to the cemetery, it is shewn that it cost \$100, and its fencing \$90. It is not shewn when it was bought or fenced. No circumstance is shewn justifying the arbitrators in crediting the united townships with \$200 in respect of it. It may be that such a crediting is just, but the evidence does not shew it.

The award is not supported by the evidence and documents filed, and cannot therefore stand.

I cannot remit the matters back to the same arbitrators. They have shewn their competence only in making the arbitration highly profitable to themselves.

Competent arbitrators would have disposed of the matters in dispute in a day ; it has taken them a month, at a cost to the disputants of over \$900, besides all the costs of the three applications to set aside their awards ; and of the \$900 the arbitrators have awarded themselves \$750.

I think that counsel for the disputants should be able to agree upon the facts necessary to enable the Court to deal with the matters in dispute upon the merits without further litigation, and to enable the Court to increase or diminish the amount awarded, or otherwise to modify the award as the justice of the case may seem to the Court to require.

Failing this, I shall remit the matters referred to the consideration and determination of the Judge of the County Court of the county of Bruce.

Rule accordingly.

REGINA V. GRAINGER.

Illegal issue of license—Conviction—Certiorari.

A *certiorari* will not lie to remove a conviction under "The Liquor License Act," R. S. O. ch. 181, sec. 48, which has been affirmed and amended on appeal to the Sessions, for issuing a license contrary to the said Act, the procedure being regulated by 32-33 Vic. ch. 31, sec. 71, (D), as amended by 33 Vic. ch. 27, sec. 2 (D.)

On Friday, the 11th day of February, 1881, in Single Court, before Armour, J., *McMichael*, Q. C., obtained a rule *nisi*, on behalf of the defendant, calling upon the Attorney-General of Ontario, Thomas Holden, Esquire, Police Magistrate for the city of Belleville, the Honourable George Sherwood, Judge of the County Court of the county of Hastings and Chairman of the General Sessions of the Peace for the county of Hastings, Samuel Shaw Lazier, deputy Judge of said County Court, Thomas Appelby Lazier, junior Judge of said County Court, and William Sarsfield, to shew cause why the conviction herein, and the order and verdict affirming the same, should not be quashed, on the grounds: (1) that there was no finding by the jury to support the verdict of guilty entered by the Judge: (2) that a verdict of not guilty should have been entered on the said findings: (3) that the evidence shewed that the defendant had not wilfully and knowingly issued a license for a larger number of inns than the statute allowed: (4) that the evidence shewed that the defendant had not violated the provisions of the statute: (5) that the plain meaning of the statute shewed that no greater number of licenses had been issued than the statute allowed, and therefore there had been no offence, and should have been no conviction: (6) that the defendant Grainger, being merely an official acting under the directions of the Commissioners, ought not in any event to have been held liable.

This rule was drawn up on application of Michael Joseph Grainger, and on reading the writ of *certiorari* in this

cause, the record of conviction, the evidence taken at the trial, the verdict rendered, the findings of the jury, and the affidavits and papers filed.

The defendant, the License Inspector of the electoral division of the west riding of the county of Hastings, was, on the 16th day of August, 1880, convicted by the Police Magistrate of the city of Belleville for knowingly issuing a tavern license for the year commencing the 1st day of May, 1880, contrary to the provisions of the R. S. O. ch. 181, sec. 48.

From this conviction the defendant appealed to the Court of General Sessions of the Peace for the county of Hastings, which Court amended the conviction and affirmed the same.

He then applied for and obtained the writ of *certiorari* mentioned in the rule, for the purpose of bringing the conviction and all proceedings relating thereto into this Court.

February 18, 1881. *G. D. Dickson* shewed cause on behalf of Sarsfield, the prosecutor, and took the objection that the writ of *certiorari* had been improperly and improvidently issued: that the law forbade the issuing of a writ of *certiorari* under the circumstances of this case.

McMichael, Q. C., and *Dougall*, contra, contended that the Ontario Statutes did not take away the right to *certiorari*.

Hodgins, Q. C., appeared for the Attorney-General.

March 11, 1881. ARMOUR, J.—The defendant was convicted under the 48th section of "The Liquor License Act," R. S. O. ch. 181, which provides that "Any member of any Board of License Commissioners, or any Inspector, officer, or other person who, contrary to the provisions of this Act, knowingly issues, or causes or procures to be issued, a tavern or shop license, or a certificate therefor, shall, upon conviction thereof, for each offence pay a fine of not less than forty dollars, nor more than one hundred dollars, and in default of payment of such fine the offender

or offenders may be imprisoned in the county gaol of the county in which the conviction takes place, for a period not exceeding three calendar months."

Section 69 of the same Act provides that "All prosecutions under this Act, other than those mentioned in section 68" (of which the prosecution in question is not one), "whether for the recovery of a penalty or otherwise, may be brought and heard before any one or more of Her Majesty's Justices of the Peace in and for the county where the forfeiture took place, or the penalty was incurred, or the offence was committed, or wrong done, and in cities and towns in which there is a police magistrate, before the Police Magistrate; and the procedure shall be governed by *The Act respecting summary convictions before Justices of the Peace*.

This last named Act, R. S. O. ch. 74, in effect provides that "An Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders," 32-33 Vic. ch. 31, D, shall be the procedure applicable to a conviction such as the present. •

In *re Bates*, 40 U. C. R. 284, it was held that under this Act, R. S. O. ch. 74, then 38 Vic. ch. 4, O., a person convicted for an offence against a by-law was not deprived of the writ of *certiorari* after an appeal to the Sessions. But this was because the offence of which he was convicted was said not to be a "crime," and in that it differs from the case in hand, which is a crime.

The Act 32-33 Vic. ch. 31, D, as amended by the Act 33 Vic. ch. 27, D, has been still further amended by the Act 40 Vic. ch. 27, D, and section 65 of the first named Act now reads: "Unless it be otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice or Justices of the Peace, or unless some other Court of Appeal having jurisdiction in the premises is provided by an Act of the Legislature of the Province within which such conviction takes place or such order is made, any person who thinks himself aggrieved by any such conviction or order may appeal," &c. And although by

the B. N. A. Act, sec. 92. sub-sec. 16, the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within the classes of subjects in that section enumerated, is within the exclusive power of the Provincial Legislature, yet by sec. 91, sub-sec. 27, the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters, is wholly within the power of the Parliament of Canada; and the Parliament of Canada having provided by 32-33 Vic. ch. 31, sec. 71, as amended by 33 Vic. ch. 27, sec. 2, that no conviction or order affirmed, or affirmed and amended in appeal, shall be removed by *certiorari* into any of Her Majesty's Superior Courts of Record, I think that no *certiorari* will lie in a case like the present, and that the objection taken by Mr. Dickson must prevail.

The rule will therefore be discharged, with costs, to be paid by the defendant to the prosecutor William Sarsfield, and to such other persons called upon by the rule to shew cause as appeared to shew cause.

The *certiorari* and return thereto will be taken off the file and quashed, and a *procedendo* will issue.

See *Regina v. Johnson*, 30 U. C. R. 423; *Regina v. Roddy*, 41 U. C. R. 291.

Rule accordingly.

REGINA V. GREAVES.

Road company—Tolls—Repairs—R. S. O. ch. 152.

Under "The General Road Companies Act," R. S. O. ch. 152, secs. 102, 104, 109, the first engineer appointed to examine a road alleged to be out of repair, must act throughout the proceeding unless another is appointed under sec. 109; but under that section the Judge is the person to be satisfied that the first engineer is unable to make or complete the examination, and his decision on that point cannot be reviewed.

The engineer appointed under the Act need possess no official certificate or degree.

The second engineer having been appointed in January to examine and report "as to the present condition of the road" made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer had been performed, as it was covered with snow. In May following, without any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls.

Held, that he was *functus officio* after the first examination, and that the tolls therefore were illegally imposed.

August 27, 1881, *Ogden* obtained a rule *nisi*, upon reading the writ of *certiorari* and the return thereto filed, and the conviction, evidence, and other papers returned therewith, also filed, calling upon Thomas McCrae, police magistrate, of the town of Chatham, and Joseph Everett, the complainant, to shew cause why a certain conviction, made on the 23rd June, 1881, by the said police magistrate against the said Albert Greaves, for driving over and along the St. Clair and Rond Eau Plank and Gravel Road, and through Everett's gate, in the town of Chatham, without paying toll, should not be quashed, on the ground that the conviction was contrary to law, and there was no evidence to support it, and that Everett had no right to collect toll at the said gate from the defendant, and that the road was out of repair and condemned, and no toll could be exacted or collected thereon.

The St. Clair and Rond Eau Plank and Gravel Road Company were a duly incorporated road company, under the provisions of ch. 152 R. S. O., and the owners of the road known as the Rond Eau Plank and Gravel Road,

between the town of Chatham and the village of Blenheim, and the defendant was convicted before the police magistrate of the town of Chatham, for having, on the 31st of May, 1881, passed the toll-gate known as Everett's toll-gate on the said road without paying the legal toll.

The defendant contended that in the events which had happened the right of the company to collect tolls at the gate in question had ceased or been suspended.

The facts, which appeared by the return of the *certiorari* to have been admitted as proved before the magistrate, were as follow :—On a requisition of twelve freeholders of the county, presented to the county Judge, upon due notice to the company, the Judge, on the 25th March, 1880, under the authority of section 99 of R. S. O. ch. 152, made an order, directed to Mr. W. G. McGeorge, P. L. S. and civil engineer, directing him to examine the road in question, and perform the various duties required of him in such case by the Act.

Mr. McGeorge having examined the road reported it out of repair, so as to impede and endanger her Majesty's subjects travelling thereon, and on the 8th of April, 1880, gave notice to the company, as provided by sect. 101 of the Act, to repair and make good the road by the 1st July, 1880.

The road was not repaired by that date, and McGeorge, under section 102, sub-section 2, extended the time for repairing it until the 1st of November, 1880.

At the expiration of the extended time the road was not properly repaired, and the company shortly thereafter, viz. on the 9th of November, ceased to take toll thereon.

On the 12th December, 1880, the company petitioned the county Judge to appoint a competent person to inspect and examine the road, and report whether or not it was in a good state of repair.

On the 15th January, 1881, the Judge, by endorsement on the petition, appointed J. W. Shackleton, of the town of Chatham, civil engineer, to examine and report "as to the present condition of the road." On the 5th February, 1881, Shackleton certified to the Judge that he had examined the

road, but he did not certify that it was in good and efficient repair, the fact being that, as the road was covered with snow, he was unable to say whether the repairs which Mr. McGeorge had directed had been performed.

On the 30th of May, 1881, Shackleton, at the request of the company, and without any further order or appointment of the Judge, certified that he had examined that part of the road extending from the town of Chatham to the village of Blenheim, that it had been repaired, and was in a good and efficient state of repair, and the company immediately began again to take tolls thereon.

Evidence was given before the magistrate that McGeorge had not from any cause become unable to act in completing the examination of the road, or to certify as to the performance of the repairs, and also to shew that Shackleton was not a certificated engineer or land surveyor. He himself deposed that he was an "engineer."

The magistrate convicted the defendant, and imposed a fine of \$1 and costs.

September 13, 1881. *Ewart* shewed cause. It is contended that the appointment of Shackleton was illegal, because of section 102, sub-section 3, of R. S. O., ch. 152. That section, however, is in conflict with section 104 of the same chapter, both being almost identical, with the exception that in the former the word "the" appears whereas in the latter it is "an." [He then referred to the earlier statutes, C. S. U. C. ch. 49, sec. 87; 23 Vic. ch. 54, sec. 2; 29 Vic. ch. 36, sec. 6; 31 Vic. ch. 31, sec. 1, O.; 35 Vic. ch. 33, sec. 3, O.; 37 Vic. ch. 24, sec. 3, O., to prove that although formerly the Acts required the same engineer to perform all the duties prescribed by the Act, the latter statutes shewed a deliberate change of policy.] Another point taken is, that after Shackleton's first certificate he was *functus officio*. It is true that the order appoints him to report as to the then condition of the road, but the order must be read not as an appointment, but as an approbation by the Judge of Mr. Shackleton as an engineer, and the duties are prescribed by the statute, and not regulated by the Judge.

Pegley, contra. Shackleton's appointment can only be good if made under the provisions of section 109, and it is not pretended that McGeorge was "unable to make or complete" the matter. The Judge's order of appointment, in any case, is limited to one act, and does not authorize a second examination or report, and such second report is not worth anything.

September 17, 1881. OSLER, J.—Section 99 of the Joint Stock Road Companies' Act, R. S. O., ch. 152, enacts that if the company suffers any portion of their road on which tolls have been taken to get out of repair, the county Judge may, upon the requisition of twelve freeholders, direct any competent engineer, not being a shareholder "in the road," to examine the same.

After being sworn to perform his duties impartially, &c., section 101 enacts that if upon examination by him the road is found so much out of repair as to endanger or impede persons travelling thereon, the engineer is to give the company notice thereof, and require them to repair the road within a time to be named in the notice.

Section 102 directs "the engineer" to again examine the road at the expiration of the time limited, and if he finds the same repaired in a good and sufficient manner, he is to certify the same if required by the directors.

Sub-section 2 empowers him, in his discretion, to allow in writing a further time for repairing the road, without discontinuing the taking of tolls.

By sub-section 3, however, if he does not grant such extension of time, or if having granted it he does not, at its expiration, find the road properly repaired, the directors are prohibited from taking toll "until the engineer has again examined the road and certified it to be in good and efficient repair."

Section 103 provides for the proceedings which are to be taken if the company dispute their road being out of repair, as reported in the notice given by the engineer under section 101. If the Judge decides that the road is

out of repair, the directors are prohibited from taking toll until the repairs are completed.

Section 104 is substantially the same as section 102, sub-section 3, except that it embraces as well the case provided for by that sub-section as the case of the decision of the county Judge, of the road being in disrepair, and prohibits the exaction of toll in both cases under the same penalty, until "an engineer, approved by the Judge of the County Court, has again examined the road and certified it to be in good and efficient repair."

Section 109 provides that if the engineer first appointed by the county Judge becomes from any cause unable to make or complete the examination, or to do or complete any proceeding required of him by the Act in relation to the requisition of the freeholders, the Judge of the County Court being satisfied thereof, may, upon the application of the parties interested, appoint some other engineer.

The only question I have to consider is, whether the magistrate had jurisdiction. I do not sit here to review his decision upon the evidence. The form of the conviction is not objected to. Then is any want of jurisdiction disclosed on the evidence? The defendant contends, 1st, that on the proper construction of the Act the only engineer who can certify that the reparations have been completed is the engineer originally appointed by the Judge, unless, in the event provided for in section 109, another engineer is appointed, which event he says did not occur; 2nd, that Shackleton, the person secondly appointed by the Judge, was not an engineer; and 3rd, that even if his appointment was valid, it only enabled him to report on the "present" condition of the road, and having made a report in pursuance of the appointment, he was *functus officio*, and had no authority to make the subsequent examination and the report of the 30th May.

I do not think that sections 102 and 104 are, as was argued, necessarily inconsistent; they must be read with section 109, and their proper construction, in my opinion, is that the engineer first appointed is to act throughout the pro-

ceedings, unless another is appointed by the county Judge under section 109; and I am quite clear that if the county Judge does appoint another, the validity of his appointment, so far as it depends upon whether the first engineer was unable or had refused to act, cannot be enquired into before the magistrate or by me. The Judge was the person to be satisfied—and it is not said how—of the necessity for another appointment, and the magistrate cannot sit on appeal from his decision.

As to the second objection, the Act only requires the Judge to appoint a competent engineer, and I am not aware of any law which requires an engineer to possess an official certificate or university degree, except in certain employments in which special engineering skill is required, *e. g.*, steamboat or railway engineers. Both of these objections, therefore, in my opinion, fail. The third remains to be considered.

The directors had no right to demand tolls until an engineer approved, that is, appointed by the Judge, had examined the road and certified it to be in good and efficient repair. Shackleton was an engineer appointed and therefore approved by the Judge under section 109. He was appointed on the company's petition of the 12th December, 1880, which stated that the road was then in a good state of repair, and his appointment plainly authorized him to examine and report as to the "present" condition of the road. I cannot say that an appointment so limited was improper, or that the oath of office which the engineer so appointed must have taken under section 101 was not limited in like manner. Having examined and reported upon the condition of the road in February, I think his authority under his appointment was at an end, and therefore his subsequent examination and certificate were unauthorized. That being so, the power of the directors to collect tolls was not revived, and the conviction must be quashed, but without costs.

Rule absolute to quash conviction, without costs.

IN RE RYER AND PLOWS.

Memorandum of conviction—Appeal to Sessions—Return of conviction after verdict—Mandamus.

A conviction must be under seal. A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the General Sessions, or, in the discretion of the Chairman, even during an adjournment for judgment.

A minute of conviction signed by the Justice, but not sealed, was returned to the Sessions upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The Chairman reserved judgment until a day named, and during the adjournment the Justices returned and filed a conviction under seal. The Chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard.

Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the Chairman's discretion, which could not be reviewed.

September 6, 1881. *George Bell* moved, on notice, for a mandamus to the Chairman of the General Sessions of the Peace for the County of Bruce, commanding him (1) to cause all proper continuances to be entered on the minute book of the said Court of General Sessions, and to give judgment on and determine the matter of an appeal against a conviction in which one John Ryer was informant, and one Robert Plows was defendant, by affirming the said conviction in accordance with the verdict of the jury empannelled and sworn on the said appeal. (2) To make such order in the matter of the appeal as to costs, &c., as to the Court should seem proper, and to order and adjudge Robert Plows to pay the amount adjudged by the said conviction.

The affidavit of Thomas Dixon, the Clerk of the Peace for the County of Bruce, stated that he acted at the Sessions on behalf of Ryer, in opposing the appeal: that such appeal was against a conviction of the said Robert Plows made by three Justices of the Peace: that having been duly entered the appeal was, on the 17th of

June, called on for trial, and a jury empannelled at the request of Plows, who found him guilty of the offence of which he had been convicted, and their verdict was received and recorded: that, on the 18th of June, on a motion made to the Court for an order adjudging Plows to pay the fine and costs, and the costs of appeal, and to amend the conviction where necessary, it was objected by the appellant that no such order could be made, as the conviction was not sealed: that the learned Chairman of Sessions reserved judgment until the 2nd July, and during the adjournment the Justices filed with the Clerk a conviction under seal: that at the adjourned Sessions Plows objected that the conviction was filed too late, and could not be looked at, and the learned Chairman held that he could not give any judgment, or make any order on the appeal, there being no conviction to amend or enforce: that, on behalf of the informant, the absence of a conviction was urged as a reason why the appeal should not be entered for hearing, but the learned Chairman, after consideration, directed the appeal to be entered for trial.

The only document which appeared to have been returned to the Sessions, or to have been before the Court at the time the appeal was entered and tried, was the minute of a conviction of Robert Everett and Robert Plows for hunting deer. Each was fined \$10 and costs; and if not paid within ten days, to be imprisoned for twenty days. This minute was signed, but not sealed, by three Justices. The conviction returned by the Justices, and filed during the adjournment, was a formal conviction, under seal of the same Justices, bearing date the 3rd March, 1881, of Robert Plows alone, for unlawfully hunting deer in the close season.

September 13, 1881. *Clement* shewed cause. A mandamus will not lie to the Chairman of the General Sessions in this case, the appeal having been decided on the legal merits: *Regina v. Justices of Middlesex*, L. R. 2 Q. B. D. 516, and cases there cited. Even if mandamus will lie, the Chairman was right, as the conviction was put in too late:

Chaney v. Payne, 1 Q. B. 712; *Regina v. Smith*, 35 U. C. R. 518.

George Bell contra. The defendant is precluded from taking the objection that there was no conviction under seal before the Sessions after the case has been heard on the merits and the jury have found the defendant guilty. By 32—33 Vict. c. 31, sec. 42, D., the conviction shall afterwards be drawn up. Sec. 72 is directory, not imperative. The conviction filed by the magistrates on the 29th of June should have been received and enforced: *Ex parte Johnston*, 3 B. & S. 947, 952; *Rex v. Barker*, 1 East 186; *Rex v. Justices of Huntington*, 5 D. & R. 588; *Massey v. Johnson*, 12 East 82; *Selwood v. Mount*, 1 Q. B. 734; *Chaney v. Payne*, 1 Q. B. 712; *Charles v. Greene*, 13 Q. B. 216. The present case is distinguishable from *Rex v. Smith*, 35 U. C. R. 518. If the paper first delivered by the magistrates be treated as a conviction, and not a memorandum under sec. 42, it should have been amended by the Chairman under sec. 68. Sec. 65, as substituted by 33 Vict. c. 27, sec. 1, D., is imperative, and provides that “the Court * * * shall hear and determine the matter of appeal.” The word “conviction,” used subsequently in this section, means a conviction in fact; and after the appeal had been heard on the merits an order should have been made, as the section provides, whether there was any formal record of the conviction before the Sessions or not. The notice of appeal and recognizance were then admissible against the defendant, as evidence to prove the conviction.

September, 17, 1881. OSLER, J.—The Summary Convictions Act, 32—33, Vic. ch. 31, sec. 42, D. provides that if the Justices convict, or make an order against the defendant, a minute or memorandum thereof shall then be made, and *the conviction* or order shall afterwards be drawn up by the Justices in proper form, under their hands and seals. Sec. 65 provides that in every case where any conviction or order is quashed on appeal, the proper officer shall forthwith endorse on the *conviction* or order a memorandum that the same has been quashed.

"The conviction concludes with an attestation under the hand and seal of the magistrate, which is the only proper mode of authenticating it as the record of his proceedings:" *Paley on Convictions*, 5th ed., 285.

In the same work it is said, p. 293, "The Justice ought regularly, in every instance * * * to return a record of his conviction to the Sessions;" and at p. 367, "On the hearing of the appeal, the Sessions can only take notice of the record of the conviction returned by the magistrate." At p. 294, the case of *Proser v. Hyde*, 1 T. R. 414, is cited as authority for the proposition that if the magistrate, after receiving due notice of appeal, neglects to return the conviction, whereby the party is prevented from prosecuting his appeal, he is liable in an action on the case for the special damage.

In *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 U. C. R. 577, it was held that an order or conviction not under seal need not be quashed before action brought for anything done under it.

Mr. Justice Wilson, in the former case, while of opinion that a conviction, though not under seal, might be quashed on motion, said: "I do not think it is necessary to do so, for by this material and essential defect in it it is not such a proceeding as the statute requires, and there is therefore in point of law no conviction."

In this case the appeal was duly entered, that is, the notice of appeal and the recognizance (if given) were proved. There is nothing that I am aware of which makes it necessary that the formal conviction should have been returned and filed before the appeal is entered, or even before the hearing has commenced. It must, no doubt, as the authorities I have referred to shew, be proved at some time during the hearing, but at what time is a matter of practice, and in the discretion of the Court: *Paley on Convictions*, 370, 371, 372.

It was contended, on the authority of *Regina v. Smith*, 35 U. C. R. 518, and *Chaney v. Payne*, 1 Q. B. 712, that after the notice of appeal had been given, and the time for

hearing the appeal had arrived, it was too late for the Justices to return a formal or amended conviction. I agree that they cannot then return an amended conviction, that is to say, if they have already returned one they cannot at that stage return another and more formal one in order to protect themselves in an action; and the cases relied upon decide no more than this. Here, no conviction at all had been returned when the appeal was entered, and therefore these cases are not in point.

But while I am of opinion that the conviction may be returned, and proved at any time during the hearing, I have great difficulty in holding that I can now interfere. The appeal had been tried, the hearing of it brought to a close, and judgment moved for on the finding of the jury. The learned Chairman reserved his decision on the objection interposed by the appellant that the conviction was not proved—that, in fact, there was no conviction before him to be affirmed—and as the case then stood I think the objection was well taken. Pending the adjournment for judgment the formal conviction was filed in the office of the Clerk of the Peace. In effect, the learned Chairman has declined to re-open the case by admitting it in evidence, and has dealt with the appeal as it stood when he reserved judgment. I think it was quite within his power to have permitted the formal conviction to be proved, even at that stage, but in the exercise of his discretion he declined to do so. To grant a mandamus would be to review his decision on this point, which I have no power to do: *Paley on Convictions*, 375; *Regina v. Justices of Middlesex*, L. R. 2 Q. B. D. 516. The matter therefore stands in just the same position as if the appellant had been required and had failed to prove the conviction at the opening of the appeal: there was no conviction either to affirm or to quash, and the learned Chairman took the only course that was open to him by refusing to make any order. The result is, that the conviction stands in full force, and the Justices who, by their laches, have caused this difficulty, are perhaps fortunate

in being able to shew that the appellant has really sustained no injury in consequence of it.

The motion is therefore refused. I do not think it is a case for costs.

Judgment accordingly.

IN RE PECK AND THE CORPORATION OF THE TOWN OF GALT.

Dedication of public square—Powers of municipality to close—By-law not in public interest—Municipal Act, ss. 467 and 509—Costs.

A municipal corporation laying out a square or park, on lands acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act, R. S. O. ch. 174, at least where no private rights have been acquired in consequence of their action; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated.

The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction."

Held, that the municipality had no power to close up part thereof, and dispose of it to trustees of a church.

The by-law for this purpose contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not take effect till the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it.

Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class.

Held, also, that the applicant was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage.

Costs were not asked for in the rule, though they were at the bar:

Held, that as costs are in the discretion of the Court under the Judicature Act, this was no objection.

May 31st, 1881, *C. A. Durand* obtained a rule *nisi* from Armour, J., sitting alone, calling upon the Corporation of the town of Galt to shew cause why their by-law, No. 316, should not be quashed on the grounds: (1) That the land constituting a portion of the public square known as

"Queen's Square," within the limits of the town of Galt, and which by the terms of the by-law was to be closed and stopped up, and sold to the trustees of the Central Presbyterian Church, had been, on the 3rd September, 1849, dedicated by William Dickson, then the owner thereof, to the town of Galt, as shewn by a map filed on that day in the Registry Office of the county of Waterloo, the words upon the said filed plan inscribed relative to the said Queen's Square being the following: "Square to remain always free from erections or obstructions:" the Queen's Square by the terms of the said dedication not being subject to be stopped up, or sold, &c. : (2) That the said Queen's Square having been used and recognized by the inhabitants of the corporation of the said town of Galt for upwards of thirty years, was conclusive evidence of a dedication thereof, and the corporation were in the position of trustees respecting the same, and had no power to close or stop up, or alienate the same, or any part thereof.

The by-law in question, after reciting that the trustees of the church had petitioned for the closing up and sale to them of that portion of the public square in front of their properties, and that it appeared that no one would be excluded from ingress and egress to and from his land by the closing and selling of such portion, enacted that a portion of the square, as described, consisting of a part of the land embraced in one of the angles thereof, should be closed and stopped up : (2) that the portion so stopped up should be sold to the trustees of the church upon their conveying to the town certain other land mentioned in the by-law, and on payment of all costs and charges and expenses incurred by the town in posting up and publishing the necessary notices, and in preparing the by-law, deed, &c. : (3) that the land acquired from the trustees should be added to and form part of Main street, Queen's Square, and Market street : and (4) that the by-law should take effect and come into operation only upon the trustees furnishing a bond satisfactory to the Council indemnify-

ing the corporation from all loss, &c., by means of having passed the by-law, or by reason of any proceedings taken against it to quash the same, or in defending such proceedings, or any other proceedings for anything done under the by-law.

The affidavit of the applicant verified a copy of the original plan, made by James Pollock, P. L. S., for William Dickson, the then owner of the property, on which Queen's Square and the streets adjacent were laid down, filed in the Registry Office on the 3rd September, 1849. On the square, as described on the plan, appeared the words, "Square to remain always free from any erections or obstructions."

Another plan shewed that portion of the square which was closed by the by-law, and the position of the property acquired under it by the town.

The applicant deposed that the square had been dedicated to the public by the late William Dickson, the owner of the land, and that the same had always been since the 3rd September, 1849, recognised and used by the inhabitants as a public square: that the closing of that part of the square mentioned in the by-law would not be beneficial, or for the interests of the inhabitants of the town, and the public would be deprived of the use of that part of the square. He submitted that the by-law was contradictory and inconsistent in enacting distinctly and without qualification, in one paragraph, that the square should be closed and stopped up, and in others that the by-law should not take effect until the delivery of a conveyance of other land by the trustees to the town, and of a bond of indemnity against costs, &c.

Several other affidavits were filed, stating that the square had always been used as a public square, free from any erection or obstruction, since 1849.

A number of affidavits were filed in answer to the rule, some of which stated in substance: (1) that the plan referred to by the applicant was not filed before the 8th October, 1851, and was not an original plan, but a compilation from various former unregistered plans: (2) that

the square in question, formerly known as "Market Square," had been in existence as early as 1834, and that lots fronting on it had been sold according to a plan made by one Kirkpatrick, P. L. S., not produced, on which it appeared to have been laid down; and the memorials were produced of deeds made by Mr. Dickson, registered in 1836, 1839, and 1841, in which it was referred to as "a square laid out on the plan, to be hereafter appropriated to public purposes," or as "the public square," or "the Market square": (3) that in 1851 and 1867, maps of the town were prepared, the latter by Mr. Pollock, the surveyor who made for Mr. Dickson the plan relied on by the applicant, on which the square was shewn without any special words of dedication—the contention of the deponents being that long before the registration of the plan of 1849 the square had become legally dedicated to and the property of the public, by the owner of the fee, without any restrictions or conditions. One of the deponents, a member of the Church Property Committee, who stated that he was assignee of one of the lots sold by Dickson, fronting on the square, insisted upon his right to have the square used by the public and the corporation in any way or for any purpose provided for by the Municipal Act, without any restriction or condition being imposed on the right of the corporation to close up and sell the said square.

The mayor, reeve, and three councillors deposed that the portion of the square to be closed by the by-law was seldom used, and that in their opinion the appearance of the square would be improved and the public benefited by the proposed change.

One Broomfield, another councillor of the town, and a member of the property committee of the church, made a similar affidavit.

The last mentioned deponent and others swore that the square had already been encroached upon to the knowledge, and, inferentially, without any objection on the part of Mr. Dickson, by the verandah of an hotel adjoining the square,

and by the erection of a band stand and the placing of a cannon thereon.

Robert Gilhohn and Thomas Todd swore that the applicant had more than once, prior to the passing of the by-law, suggested the closing of the angle of the square as afterwards effected by the by-law, and had offered to induce some ratepayer, who was believed to be hostile, not to oppose it.

The latter statements were denied by the applicant's affidavits in reply.

Several other affidavits were filed in reply, one of the deponents being a member of the Council, affirming that the closing of the square would be neither a convenience to the public nor an improvement of the square.

It appeared that the registered plan bore date the 3rd September, 1849, but it was not clear upon the affidavit whether it was registered before the 8th October, 1851. No other plan had been registered up to that date.

W. A. Dickson, one of the heirs of the late William Dickson, deposed that the latter had in his lifetime frequently told him that it had always been his intention that the square should be free from any erections or obstructions.

September 13, 1881. *J. K. Kerr*, Q.C., shewed cause. Certain descriptions of property on record in the Registry Office of the county of Waterloo, disclose that the late Hon. William Dickson, long prior to the maps prepared for the late William Dickson, sold lots bounded by the Queen's Square, then called "Market Square," and shew that the dedication was made without any conditions or reservations; and no conditions can afterwards be attached by a donor or his heirs, where the dedication is made in the first instance without condition or reservation. The square is within the jurisdiction of the Municipal Council, who own the soil and have full power to stop up or alienate any portion of the said square. The verandah of the Queen's Hotel infringed upon the Queen's Square, and such

verandah was built with the knowledge and approbation of the said William Dickson. A certain band stand and a piece of artillery have been for years and are still upon the said square, and these were put there with the knowledge of the late William Dickson, shewing that the inscription on the map, that the square should always remain free from any erections or obstructions, has not been acted upon or put into force. The applicant, as shewn by certain depositions put in, was the first to suggest that the trustees of the Central Presbyterian Church should have conveyed to them the portion of the square exchanged and sold by the corporation, and he should be estopped from making any complaint in respect thereof, and should not in any event be allowed the costs of his application. The depositions on behalf of the defendants shew that the stopping up in the way proposed by the trustees will not be injurious to the public but ornamental to the square, inasmuch as a costly edifice—a church—has been erected adjacent to the square, upon an express contract with the corporation that they should have it for a frontage to the said church; it should not now be taken from them, and cannot be without injustice. He referred to *Attorney-General v. City of Toronto*, 10 Gr. 436.

C. Durand, contra. The dedication, which took place upwards of thirty years ago, constituting what is contained in the Queen's Square, having been made absolute as an easement to the inhabitants of the town, cannot be, nor can any portion of it, be stopped up or alienated. In addition to the effect of lapse of time there is inserted on the map filed in the Registry Office of the county of Waterloo upon the space set apart for the Queen's Square, the words, "square to remain always free from any erections or obstructions," thereby shewing the intention of the donor. The action of the Municipal Council of the town of Galt, in ordering a portion of the square to be stopped up and conveyed to the trustees of the Central Presbyterian Church, was wholly illegal, and *ultra vires*. A corporate body is simply a trustee, and is amenable in equity

as an individual, and any alienation of the land was a breach of trust, and the corporation should be ordered to reconvey. The dedication did not vest the soil in the corporation, but the soil remained in the donor and his heirs, subject to an easement, or right of use by the public. The Municipal Act, which invested the Council with certain powers over lands of the description referred to is subject to the rights of private individuals. At the time of the incorporation of Galt as a village, and at the time the square was dedicated, certain powers were given to the corporation, but among these powers there was no power given to stop up or sell public squares. The maxim, "*Expressio unius est exclusio alterius*," should apply. There is no express power given in the Municipal Act to towns to pass by-laws to stop up or sell squares, and the maxim above quoted should apply. The Municipal Council, in exacting a bond of indemnity from the trustees of the Central Presbyterian Church against all actions and damages, disclosed that they were acting in bad faith, and either knew that they were about to do an illegal act, or were in doubt as to their powers to do the acts complained of, and they should thereby be visited with costs of the application.

September 23, 1881. OSLER, J.—The affidavits, I think, shew that long before the plan of the 3rd September, 1849, was made or registered, the property now known as Queen's Square had been actually and intentionally dedicated for the use of the public, by the owner of the soil, either as a public square or a market square, and it must have appeared as a square upon the earliest plans referred to in any registered instruments and from which all existing plans have been compiled. I think it is extremely probable that none of the older plans indicated any restriction upon its most general use by the public as a square, and that it was not until the plan of 1849 was made that the terms "to remain always free from any erections or obstructions," were imposed. At this time, however, as I have said, the dedication to the public was complete, and

apparently free from any limitation or condition, and the words on the registered plan could not qualify or restrict, even if they purport to do so, the public right.

It was conceded that if the corporation had accepted a conveyance of this land in trust for the use of the public as a square, or for other public uses, they could not have dealt with it in derogation of the trusts; but it was strongly urged that where they were merely passive, and the intention to dedicate was merely to be inferred from the owner's acts, *e. g.*, by selling lots fronting on a square, or registering a plan, they were not bound by any trust or charged with any obligation to preserve the property for the uses to which it might have been the intention of the owner to dedicate it.

I was referred to no authority, and have been unable to discover any, in support of this distinction, and I think no such distinction exists. Whether the dedication arises from the acts of the owner, or by express grant, or contract, the corporation, if they accept it at all, must do so on the terms imposed, or for the purpose indicated by the donor.

The by-law in question is clearly an infringement of those terms in the present case, and were it not for the provisions of section 509 of the Municipal Act, R. S. O. ch. 174, I should have no difficulty in holding that it was invalid on that ground.

The defendants, however, contend that they have full power under that section to deal with the square as they please. It enables the Council to pass by-laws for opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications within the jurisdiction of the Council; and the case of *The Attorney-General v. The Corporation of the City of Toronto*, 10 Grant 436, was relied on as an authority expressly in point. It appears to me, however, to be very distinguishable from the case in hand.

The facts were, that land having been at one time

vested in trustees for the benefit of the inhabitants of the town of York, as a public walk, &c., an Act was passed enabling them to transfer it to the corporation to hold upon the same trusts. By a subsequent Act the corporation were empowered to lease or sell the lands absolutely, expending the proceeds in the purchase and improvement of other lands, to be held on the like trusts. The lands were laid out by the corporation as a Fair Green, and afterwards as a park, and fenced in and improved. A by-law having been then passed to lease them for a long term of years, for building purposes, the plaintiff contended that this was a misappropriation of the property, and would injure the value of adjoining premises, especially her own. It was held that, under, sec. 425 of ch. 48, 36 Vict., similar in its terms to section 509 of the present Act, the corporation, notwithstanding that they had laid it out as a park, which the Court treated as equivalent to the term square, had full power to close up this piece of ground, and take from it its use and character as a park.

There the corporation were the owners of the land, which, although held on certain trusts, they had express power to lease, or to sell absolutely; and in this consists the difference between that case and the present. A square or park which they lay out upon lands acquired by them for that or other purposes, untrammelled by any trust as to its disposal, may be dealt with under the ample powers conferred upon them by section 509; at least, where no one has acquired any rights in consequence of their action; but that section does not, in my opinion, authorize them so to deal with property dedicated by the owner for a special purpose, as was the case here. For such a purpose, *i. e.*, that of a public square, they might, I think, accept a dedication of property under section 467 of the Act, which clearly distinguishes between their power to dispose of property acquired by dedication, and that acquired by purchase.

I refer to *Attorney-General v. Goderich*, 5 Gr. 402; *Attorney-General v. Municipality of Town of Brantford*, 6 Gr. 592; *Vestry, &c. v. Jacobs*, L.R. 7 Q. B. 47.

The by-law is also open on its face to another objection, viz., that it was not passed in the interest of the public, but for the benefit of a particular class or corporation: *Morton v. The Corporation of the Town of St. Thomas*, decided by me in Single Court, and affirmed in appeal, but not yet reported. So manifestly is this the case that it provides not only that the trustees of the church shall pay all the costs and expenses incurred by the defendants in preparing and passing it, but also that it shall not go into operation until a bond has been furnished satisfactory to the Council, indemnifying them against all loss which may be incurred by reason of passing it, and by reason of proceedings being taken to quash it, or for anything done under it. Such stipulations as these are not found in a by-law in which the public are concerned, and it is not to be overlooked that one of the trustees of the church is a member of the Council, and makes an affidavit in support of the by-law on the present application.

On both grounds I am of opinion that the by-law should be quashed.

I think the applicant is not disqualified from moving against it, by reason of anything shewn to have been said or done by him before the passage of the by-law. At the most, assuming the facts to be exactly as they are alleged against him, he at one time expressed an opinion favourable to it, but it does not appear that the action either of the trustees of the church or of the defendants was induced or influenced by anything which he said or did, or refrained from doing. Many of the cases on this point are collected in the judgment of the late Chief Justice Harrison, in *Regina ex rel. Regis v. Cusac*, 6 P. R. 303.

As to costs, it was argued that not having been asked for by the rule, they ought not to be given. The practice under the old procedure was not inflexible in this respect, and under the Judicature Act the costs of the proceedings are in the discretion of the Court. I can see no reason why the successful party should not have them in this case, particularly as the defendants are indemnified.

Rule absolute to quash by-law, with costs.

REGINA V. WASHINGTON.

Conviction—Appeal to Sessions—Right to a jury—32-33 Vic. cap. 31-36 Vic. cap. 58, sec. 2—Construction of Statutes—New evidence—Irregularity.

On an appeal to the Sessions from a conviction by a magistrate for breach of a Municipal by-law, it is in the discretion of the chairman to grant or refuse a request for a jury, under 36 Vict. cap. 58, sec. 2, which is declaratory of the meaning of sec. 66 of the 32-33 Vict. ch. 31, and is not confined to cases under the Acts mentioned in the preamble and title, which relates only to the desertion of seamen.

Remarks as to embracing in one Act several subjects which are not expressed in the title; and as to the effect of the title and preamble of a statute as guides to the construction.

The by-law mentioned in this conviction was not put in or proved at the hearing before the magistrate, or at the first hearing on the appeal, but was put in at the adjourned hearing: *Held*, sufficient.

On the appeal the appellant tendered evidence and witnesses not heard on the trial before the magistrate, which the chairman rejected, relying on 32-33 Vict. ch. 31, sec. 66, which however had been repealed by 42 Vict. ch. 44, sec. 10. The conviction was amended and affirmed, as and for a breach of a municipal by-law.

Held, that the appellant had the right, under either the Dominion Act or R. S. O. ch. 74, sec. 4, which governed the case, to have such witnesses examined, and having been deprived of this right, the order of Sessions should be quashed.

The original conviction was for "acting in a disorderly manner by fighting, and breaking the peace, contrary to the by-law and statute in that behalf;" imprisonment with hard labour was imposed in default of payment of the fine, and the costs were made payable in the alternative to the magistrate or the prosecutor. *Held*, bad.

Held, also, following *Re Bates*, 40 U. C. R. 284, that the conviction being for breach of a by-law, the writ of *certiorari* was not taken away by R. S. O. ch. 74.

THE defendant was convicted by the mayor of the Town of Orangeville "for creating a disturbance and acting in a disorderly manner, by fighting on the street, and breaking the peace, contrary to the by-law and statute in that behalf."

He appealed to the General Sessions of the Peace, and requested the Court to empanel a jury to try the facts of the case. His request was refused, and the appeal was tried by the Court without a jury, and the conviction amended and confirmed. As amended it was a conviction "for creating a disturbance and acting in a riotous manner on the street known as Broadway street, in the Town of

Orangeville, contrary to a certain by-law of the Municipality of the Town of Orangeville, passed on the 7th March, 1864, for the good government of the Town of Orangeville."

The proceedings having been brought up into this Court by *certiorari*, Murphy obtained a rule *nisi* to quash the conviction and order of Sessions, on the following, among other, grounds :

1. That the information disclosed no offence under the common or statute law, and no by-law was proved as in force in the County of Dufferin, or any part thereof, creating such an offence as laid in the information.

2. There was no proof of any by-law of the Town of Orangeville, either on the original hearing or on the appeal.

3. The offence was not alleged, either in the information or conviction, to have occurred within three months prior to the information being laid.

4. The conviction was bad for adjudging imprisonment with hard labour in default of the payment of the fine.

5. That on the trial of the appeal the Court refused the request of the appellant to empanel a jury to try the facts of the case.

6. That the Court on the trial of the appeal held it to be unnecessary to prove any by-law of the Town of Orangeville, or County of Dufferin.

7. That the conviction disclosed no offence.

8. That the Court ruled out evidence tendered by the appellant on the appeal.

It appeared from the minutes of the evidence and proceedings on the appeal, taken by the learned chairman, and returned with the *certiorari*, that the appeal was heard on the 15th June, 1881, and that on the opening of the case the appellant's counsel asked for a jury, which the learned chairman declined to grant, as there was a large amount of business to be disposed of, and he was anxious to discharge the jury on Saturday, and the matter was besides of very little importance.

After several witnesses had been examined, the appellant's

counsel tendered further evidence, and the chairman ruled that so far as the case had proceeded it was an appeal under the provisions of the Dominion Act, and no other evidence should be admitted than that which had been taken before the magistrate. He referred to the Act, and the appellant's counsel did not object further, and closed the case.

At the close of the case it was noted that Mr. Scott (respondent's counsel), produced the by-law of the Village of Orangeville, upon which the conviction was made, and the evidence. The by-law, however, was not then filed.

The learned chairman found on the evidence that the appellant was guilty, that the conviction was correct, and dismissed the appeal. The Sessions was adjourned to dispose of the question of costs, until the 4th of July, the first day of the County Court Term, when a copy of the by-law, certified by the clerk of the corporation and the mayor, was filed, and the order affirming and amending the conviction was drawn up.

Notice of application for the *certiorari* was served on the chairman, clerk of the peace and informant, but not upon the convicting magistrate. Subsequently, however, notice, abandoning this notice, was served upon these parties, and a fresh notice served upon all proper parties.

Bethune, Q.C., shewed cause, taking the preliminary objection that no notice had been served upon the magistrate, and contending that the defendant's right to a *certiorari* was abolished by statute, the conviction having been affirmed on appeal. The effect of 36 Vic., c. 58, D., was to leave the jury discretionary with the Judge. The Act was not confined solely to cases of deserting seamen. The title of the Act indicated this. It is "for other purposes" as well. The second section is not restricted by the preamble to the Act, as it has a preamble of its own, "and for the avoidance of doubt." No doubt is raised by this Act; therefore the doubt must be in sec. 66 of 32-33 Vic. c. 31. It would be anomalous to deprive seamen of a jury and not

others. The by-law was sufficiently proved. The Quarter Sessions could alter their judgment at any time during the session, or, if enlarged, at the time to which enlarged. Here, the case was sufficiently enlarged to the 4th July, and the Judge's order amending the conviction was sufficient, and the by-law was filed thereunder: *Dickenson's Guide to Quarter Sessions*, 6th ed. 74, 911; *Regina v. Bradshaw*, 38 U. C. R. 564; *Regina v. McAllan*, 45 U. C. R. 402; *Regina v. Hiscox*, 44 U. C. R. 244.

Murphy and Fullerton, contra. The language of 32-33 Vic., ch. 31, sec. 66, is clear that the Judge is bound to grant a jury upon request of either party. The right of jury should not be taken away except by clear statutory declaration; here the language is strongly in favour of the right. This case should not be sent back by procedendo. It is of trifling importance; the evidence discloses no offence. Washington acted entirely in self defence, and is not charged with an assault. There is no by-law in evidence. There is no offence disclosed under common law or statute. The charge is not under the Vagrant Act, and could not be supported thereby. There is, therefore, no case to warrant a procedendo, and in a matter of such trifling importance to the Crown a procedendo should not be granted for the purpose of endeavouring to secure a conviction, a serious matter to the individual. The law in reference to this case is not altered by 36 Vic., ch. 58. That, as indicated by the preamble, has reference only to cases of deserting seamen. The preamble is the key to the meaning of the statute: *Dwarris on Statutes*, 2nd ed. 556, 557. "For the avoidance of doubt" did not mean a doubt under 32-33 Vic., c. 31, sec. 66. There was no anomaly in depriving seamen of the right of a jury and leaving a jury to others, as by the same Act other privileges had been taken from seamen that were left to others. Statutes taking away rights in criminal matters are always strictly construed: *Re Bates*, 40 U. C. R. 284. Jury is a common law right, and should only be taken away on the clearest language. There is no by-law proved. The

adjournment made to the 4th July was for a specific purpose—"settling costs"—and the Judge had no power to amend or deal with the conviction but for that purpose. [OSLER, J.—The papers come to me from the Clerk of the Peace with this by-law put in. Am I not justified in assuming it is in properly?] Not in the face of the express ruling of the learned Judge. That displaces the presumption *Omnia rite esse acta*, and the stamping of the date of its reception by the Clerk of the Peace is not sufficient to make it evidence after that. The adjournment was for a mere purpose of computation, and not for anything of a judicial character. The by-law put in is not properly certified. It is certified as a by-law at a former date, not at the present time. The by-law is invalid, as it creates an offence not warranted by the statute. It says: "who shall be riotous or disorderly in any street, highway, or public place." The Municipal Act, c. 174, R. S. O. sec. 461, subsec. 30, gives power to make by-laws "for restraining and punishing vagrants, mendicants, and persons found drunk or disorderly in any street, highway, or public place." The objection can be taken on this application: *Regina v. Osler*, 32 U. C. R. 324. For the same reason the information and conviction are bad, as they state an offence not provided for by the by-law. The learned Judge was wrong in ruling out the evidence tendered for the defence. Only part of the defendant's case was heard, and therefore he had no trial: *Re Holland*, 37 U. C. R. 214.

The following other cases were referred to: *McKenna v. Powell*, 20 C. P. 394; *Re Nash and McCracken*, 33 U. C. R. 181; *Regina v. Caswell*, 33 U. C. R. 303; *Regina v. Hespeler*, 16 U. C. R. 104; *Regina v. Boardman*, 30 U. C. R. 553; *Regina v. Black*, 43 U. C. R. 180; *Regina v. Frawley*, 45 U. C. R. 227; *Dickenson's Guide to Quarter Sessions*, pp 75 *et seq.*; *Regina v. Bradshaw*, 38 U. C. R. 564.

October 14, 1881. OSLER, J.—Mr. Bethune's preliminary motion to quash the writ of *certiorari* on the ground that no notice had been given to the convicting magistrate, is

without foundation, as on examining the papers, it appears that although the first notice given was waived, another was afterwards served on all proper parties.

It was contended that the defendant's right to a writ of *certiorari* was taken away by statute, the conviction having been affirmed on appeal. As to this objection, however, the case of *Re Bates*, 40 U. C. R. 284, is a decision directly in point, that where the conviction is for the breach of a municipal by-law, or a penalty imposed under the authority of an Act of the Provincial Legislature, the writ of *certiorari* is not taken away by force of R. S. O., ch. 74, which, though it adopts the procedure on appeal provided by the Dominion Act, 32-33 Vic., ch. 31, has not in terms deprived the appellant of his right to the writ, which is not part of the "procedure on appeal."

It was further contended that the proceedings of the Sessions could not be reviewed on *certiorari*, even if the writ was grantable, and I agree that this Court does not sit in appeal to review the judgment of the Court of General Sessions, on the merits of a matter within its jurisdiction: per Gwynne, J., in *Regina v. Bradshaw*, 38 U. C. R. 564.

But if the conviction as affirmed and the order of Sessions appear, or are clearly shewn to have been made without jurisdiction, there is no doubt that they may be examined when returned on a *certiorari*. It is the constant practice to do so: see *e.g.*, *Re Nash*, 33 U. C. R. 181; *Re Bates*, *supra*; *Hespeler and Shaw*, 16 U. C. R. 104; *Paley on Convictions*, 403, 404, 405; and I do not think it has been doubted since the case of *Regina v. Watson*, 7 C. P. 495.

I therefore proceed to consider the objections to the conviction and order of Sessions; and first, as to the appellant's right to a jury.

Sec. 66 of the Summary Convictions Act, 32-33 Vic. ch. 31, provides that when an appeal has been lodged in due form, and in compliance with the requirements of the Act, against a summary conviction or decision, the Court of General or Quarter Sessions of the Peace,

or the Court appealed to, may, at the request of either the appellant or respondent, empanel a jury to try the facts of the case, and the Court, on the finding of the jury, shall give such judgment as the law requires, and if a jury be not so demanded, the Court shall try and be the absolute Judges as well of the fact as of the law, in respect to such conviction or decision.

Now, if this section was unaffected by any subsequent statute, I should have thought that its meaning was reasonably clear. If no jury is demanded, the Court has absolute jurisdiction to hear and determine the appeal; but if either party requests the Court to empanel one, then the judgment of the Court can only be given *on the finding of the jury*. In other words, the right and power of the Court to give judgment would, in that case, be as entirely dependent upon the finding of the jury, as its right and power to entertain the appeal at all depends upon the appellant having taken the preliminary steps to lodge it. And although, as was pointed out in *Re Bradshaw*, 38 U. C. R. 564, the jury may be but matter of procedure on the trial, and no part of the constitution of the Court, it is procedure in the absence of which, when required by law, the Court would have no jurisdiction to give judgment.

There is nothing in this view opposed to the decision in the *Queen v. Bradshaw*. There the parties not only did not demand a jury, but the respondent insisted upon the chairman of the Sessions trying the appeal without one. Having done so, and the decision being adverse to him, he afterwards moved to quash the Order of Sessions, contending that section 66 was *ultra vires* the Dominion Parliament, and came within that clause of the B. N. A. Act, which places under the jurisdiction of the Local Legislature the constitution maintenance and organization of Provincial Courts, Civil and Criminal.

This construction was not acceded to, and the point decided was, that no jury having been demanded, the appeal had been regularly tried by the Chairman of Sessions without one.

It is said, however, that under chapter 58, 36 Vic., D., it was in the discretion of the Court to grant or refuse the appellant's request for a jury. If so, this Act certainly illustrates the wisdom of the constitutional provision which has been adopted in most of the States of the neighbouring Republic, that every local and private law, in some States every law, enacted by the Legislature, shall embrace but one object, and that shall be expressed in its title.

Admitting that the expression, "and for other purposes," is capable of a wide solution, assuredly few persons would expect to find in an Act, intituled "For more effectually preventing the desertion of seamen in the Port of Quebec, and for other purposes," a section declaratory of the meaning of a particular clause in a general Act relating to the whole Dominion.

The Act contains two sections, and the preamble is as follows: "In amendment of chapter 43 of the Con. Stat. Can., and of the Act 34 Vic. ch. 32, entitled 'An Act for more effectually preventing the desertion of seamen in the Port of Quebec,' Her Majesty enacts," &c. Section one then provides that there shall be no appeal from any conviction or order adjudged or made "under the Acts cited in the preamble to this Act, or either of them" before certain tribunals mentioned in the section, and takes away the writ of *certiorari* in such cases.

The second section, which is the one invoked by the respondents, reads thus: "And for the avoidance of doubt under the Act hereinafter mentioned, it is hereby declared and enacted that the Court of General or Quarter Sessions appealed to may grant or refuse, in its discretion, the request of the appellant or respondent, to have a jury empannelled to try the facts of the case, under the 66th sec. of the Act passed in the session held in the 32nd and 33rd years of Her Majesty's reign, intituled 'An Act respecting the duties of Justices of the Peace out of sessions, in relation to summary convictions and orders.'"

Both the Acts mentioned in the preamble to the first section relate to the Port of Quebec only. Penalties are

imposed for the offences mentioned in the former, which by section 9 are made recoverable before any Justice of the Peace. The latter Act merely makes further provisions as to the penalties and offences.

The appellant contends that the operation of section two is limited to appeals from summary convictions made under the Acts mentioned in the preamble, while the respondent urges that its language being clear and unequivocal, the preamble cannot limit or restrain it.

In the recent case of *The Caledonian Ry. Co. v. The North British Ry. Co.*, L. R. 6 App. Cases, 114, in which it was sought to restrain by the preamble the generality of the enacting clause, the rule of construction was thus formulated by the Chancellor, Lord Selborne: "There is always some presumption in favour of the more simple and literal interpretation of the words of a statute; but the more literal construction ought not to prevail if it is opposed to the intention of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." See also *Ex parte Walton*, L. R. 17 Ch. D. 746, *per* Jessel, M. R.

Why should not the literal interpretation prevail in the present case?

In the first place there is the title to the Act, which, though no part of the Act, is not to be wholly disregarded in putting a construction on it. The object of the Legislature is very often avowed in the title to the Act as well as in the preamble: *Dwarris* on Statutes, Potter's Ed., p. 103; *Sedgwick* on the construction of Statutory Law, p. 39; *Wilmot v. Rose*, 3 E. & B. 563. *Greene v. Provincial Ins. Co.*, 4 App. R., p. 521. Of a similar title, Jessel, M. R., said, in *Bentley v. The Rotherham Local Board of Health*, L. R. 4 Chy. D. p. 588, "I think the title throws very little light upon the subject; still it does not appear to me to be restrictive in any way."

I think I can say no more of the title to this Act.

The question therefore is reduced to this—What is the extent and effect of the preamble?

Dwarris on Statutes (Potter's ed.) p. 109, citing *Crespigny v. Wittenoom*, 4 T. R. 793, says: "The preamble may be compared with the different clauses of the Act to collect the intention of the Legislature, and when the intention is apparent not to extend the Act, the preamble may be used in restraint of the generality of the enacting clause where it would be inconvenient, if not restrained; or it may be resorted to in explanation of the enacting clause, if it be doubtful."

Hughes v. Chester R. W. Co., 1 Dr. & Sm. 524, 31 L. J. Chy. 100: "It is an established rule that effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble, that is, that when the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be cut down by the use of language of less extensive import in the preamble. If, then, the words of an enacting clause are words admitting, according to their natural import, but of one meaning, that meaning must prevail, notwithstanding an argument to the contrary is derivable from the preamble."

See, also, *Fellowes v. Clay*, 4 Q. B. 349; *Wilmot v. Rose*, 3 E. & B. 563; *Winn v. Mossman*, L. R. 4 Ex. 297.

Now the clear words of the enacting part of sec. 2, of c. 58, go far beyond the language of the preamble, which professes to be only in amendment of the Acts cited therein, while sec. 2 is declaratory of the meaning of a particular section of another and general Act. A preamble, it is said, is often prefixed to a particular clause whose tenor is to be guided by it (*Dwarris*, p. 109), and that, as it appears to me, is the case as regards this section, which has a preamble of its own entirely distinct from the preamble to the first section. It would have been easy for the Legislature, had it been intended to deprive only parties to appeals from summary convictions under the Acts mentioned in that preamble of the absolute right to a jury, simply to have said that in such appeals it should be in the option of the Court to grant or refuse a jury; but instead of that the section in question is expressed to be for the avoidance of

doubt. I must assume that there was a doubt, as the Legislature have said so, but, if so, it was a doubt arising from the language of sec. 66 itself, and not in consequence of anything contained either in c. 58, or the Acts mentioned in the preamble to sec. 1. The meaning of sec. 66 is then declared and the doubt removed. Is it removed only for the purpose of appeals under the local Acts, and yet left to its full effect in other cases? I cannot believe that to have been the intention of the Legislature. Such a construction would be highly inconvenient and embarrassing, and yet that would be the result of holding that the general words of the section were restrained by the preamble to the Act. The other construction gives its full effect to the language of the section, in itself not equivocal, and is not repugnant to or inconsistent with the other provisions of the Act.

I confess I have hesitated in arriving at this conclusion more from the fact that the clause in question is found in its present connection, and has not, as I am given to understand, been generally noticed or acted upon, than from any doubt I feel as to its true construction as declaratory of and removing doubts in the existing law.

I think that it was in the discretion of the learned Chairman to grant or refuse the appellant's request for a jury, and therefore the objection to the conviction on this ground fails.

The other objection is, that the by-law mentioned in the conviction was not properly proved. There seems to be no doubt that it was not before the Magistrate at all on the original hearing; and although it was tendered, it was not put in or proved at the hearing of the appeal on the 15th June. A copy, however, which was, I think, sufficiently certified under sec. 282 of the Municipal Act, was put in and filed at the adjourned hearing on the 4th July. There can be no objection to the formal order dismissing the appeal, and amending and affirming the conviction, being drawn up on the latter day, as of the first day of the Sessions, the whole Sessions being considered in law as but one day. Nor is it important that the only order made on

the 15th June was to dismiss the appeal, as the Court had full power, before the actual close of the Sessions, to alter or amend their order or decision: *Dickenson's* Quarter Sessions, pp. 933, 974.

A more serious objection is, that which has been made to the refusal of the Court to hear witnesses for the appellant who had not been examined, or called at the original hearing. On the hearing of the appeal the charge seems to have been treated as one made under a Dominion Act—possibly the Vagrant Act—the information and conviction alleging the offence to be ‘contrary to the by-law and statute in that behalf.’ On that ground, *i. e.*, that the appeal was under the Dominion Act, as appears by the minutes of the proceedings returned with the conviction, additional evidence which the appellant tendered was rejected by the learned chairman, in reliance it is to be presumed upon sec. 66 of 32-33 Vic., ch. 31, the latter part of which formerly provided that no witness should be examined on the appeal, who had not been examined before the justices at the hearing of the case. All parties seem to have overlooked the fact that this part of that section was repealed by 43 Vic., ch. 44, sec. 10, which expressly enacts that “any of the parties to the appeal may call witnesses or adduce evidence who, or which, may not have been called or adduced at the original hearing.” This corresponds with the provision in the Ontario Act R. S. O., ch. 74, sec. 4.

Notwithstanding the ruling that the appeal was under a Dominion Act, the conviction was afterwards amended and affirmed as one for the breach of a municipal by-law, and therefore not for any offence under a Dominion Act. The appellant's right was the same under whichever Act the appeal was taken. Even if it could be said, which I do not think it can, that he assented to the ruling of the Court as to his right to call additional witnesses on an appeal under the Dominion Act, he might well complain of being taken by surprise on finding the conviction afterwards affirmed and amended as on an appeal under the

Provincial Act, it being plain that if it had been so treated at the trial the evidence would have been admitted, all parties being under the impression that there was a distinction in the practice in this respect.

No doubt the decision of the magistrate or Court of General Sessions as to the reception or rejection of evidence is not subject to review where it involves nothing more than a mere question of practice, or as to what is or is not admissible as evidence: *Rex v. Justices of Cambridgeshire*, 1 D. & R. 325; *Rex v. Justices of Carnarvon*, 4 B. & Ald. 86. But what was done here was something very different, and was equivalent to a refusal to hear the appellant at all. The case of *Re Holland*, 37 U. C. R. 214, is very much in point. The defendant was convicted under the Public Health Act. He proposed to call witnesses, but the magistrates held that the statute made no provision for it and refused to hear any. Wilson, C. J. says, "It is a principle and rule of the first consequence in every system of jurisprudence which assumes to decide fairly the rights of a controversy, that both parties shall be heard. Here the magistrates have refused to hear witnesses for the defence on the ground that the statute made no provision for such witnesses being called. The plain rule is, that the witnesses, in the absence of any provision expressly taking away the right to examine them, are admissible as a matter of unquestionable right."

No importance can in my opinion be attached to the fact that the Sessions heard some or all of the appellant's witnesses who had been examined at the original hearing—that they half heard his case—for a case only half heard is not heard at all. They denied his unquestionable right to call and examine other witnesses, because it appeared to them that the statute prohibited it. Under such circumstances they clearly acted without jurisdiction in confirming and amending the conviction: *Re Holland, supra*. On this ground the order of Sessions must be quashed.

The conviction must also be quashed, as, apart from the order amending it, it is manifestly defective in several

particulars, *inter alia*, (a) being for two offences, (b) imposing imprisonment with hard labour in default of payment, it being uncertain whether it is made under a statute or a by-law, and if the latter, the by-law does not authorize the imposition of hard labour; (c), the costs are made payable in the alternative, to the prosecutor, or to the mayor of the town.

Even as amended I doubt if the conviction would have been sustainable; for (1), it does not follow the language of the by-law in the description of the offence; and (2), the by-law is not in accordance with the statute in describing the offence which it prohibits. See C. S. U. C., ch. 54, sec. 282, sub-s. 9, R. S. O. ch. 174, sec. 461, sub-s. 32.

I have considered the application which Mr. Bethune made on the argument, that if I should be of opinion that the proceedings were defective, the matter should be remitted to the sessions to enter continuances, and hear the appeal. If the conviction had been good in form, that is the course I would probably have taken, but being open to the fatal objections already mentioned, and regularly before me on a motion to quash it, I think no good purpose can be served by prolonging litigation about so trifling a matter: see *Rex v. Allen*, 15 East 333.

*Rule absolute to quash order of Sessions
and conviction, without costs.*

MCEWAN V. MCLEOD.

Consent reference—Award—Appeal—R. S. O. ch. 50, sec. 205—Contract—Repudiation—Delay—Measure of damages.

An appeal lies from an award made in pursuance of a consent order of reference in a cause at *Nisi Prius* under sec. 205 of the C. L. P. Act. On the 3rd October, the plaintiff chartered the defendant's vessel the "Erie Bell," to carry salt from Goderich to Milwaukee, for 75 cents a ton, the effect of the contract being, that the vessel was to load and carry within a reasonable time. On the 11th October defendant telegraphed, "Erie Bell cannot go, will you take Steam Barge as substitute, answer quick." Some subsequent correspondence took place, the plaintiff holding the defendant to his contract, and the defendant agreeing to perform it. At this time the plaintiff could have got a vessel at \$1.00, but waited for the defendant's vessel, which was loaded on the 25th November, when the master fearing bad weather, refused to sail, and it was impossible to charter another vessel. The plaintiff who had sold the salt in Milwaukee, sent part by rail, and paid his consignee the difference in price between salt which he had to buy and the contract price. The freight by rail was \$3.50 per ton, and 50 cents had to be paid for cartage which would have been unnecessary had the salt gone by defendant's vessel.

Held, on appeal from the arbitrator, that the defendant was not entitled to hold the plaintiff to the damages which he might have recovered had he chartered a vessel at \$1.00 after the telegram of the 11th October, for that telegram, taken in connection with the subsequent correspondence, did not shew an absolute refusal to perform the contract on which the plaintiff was bound to act; but that the plaintiff was entitled to recover the difference in price paid to his consignee, the difference in the freight, and the amount paid for cartage.

APPEAL from an award made under order of reference at *Nisi Prius*.

At the trial a verdict was taken for the plaintiff by consent, subject to a reference. The usual consent order was drawn up, embodying the terms agreed upon by counsel, and among others, the following: "It is further ordered by and with the like consent, that the parties shall have the right of appealing from the said award, so to be made as aforesaid, to the proper Court in that behalf, and may appeal therefrom as he may be advised."

The arbitrator made an award finding that the plaintiff was entitled to no damages *ultra* the amount paid into Court, on the 9th plea, reducing the verdict for the plaintiff on the first count to 20c., and entering it for the

defendant on the second count, and awarding the costs of the reference and award to the latter. The plaintiff appealed on several grounds, and on the appeal coming on for argument on the 30th September, 1881, *W. R. Mulock*, for the defendant, objected that no appeal would lie from an award made upon a consent order of reference at *Nisi Prius*, and cited *Nagle v. Latour*, 27 C. P. 137.

Bethune, Q. C., (*Garrow* with him). There is a right of appeal and the appeal is in time. The rule of reference provides that the parties may appeal: R. S. O., ch. 50, sec. 205. The award, depositions, &c., were only filed on August 25th, although the award is dated May 9th. Procedure is regulated by sections 191, 192, and 193, and under these sections fourteen days is allowed to appeal after filing award, &c. Notice of appeal was given within the fourteen days, and is therefore in time. The arbitrator erred in holding the telegram of October 11th as a repudiation of the contract by defendants. It invited reply, and was otherwise inconclusive. Moreover, the time for performance had not then arrived and plaintiff was not bound to act upon the alleged repudiation. He had the option to wait until the time for performance was past: *Frost v. Knight*, L. R. 7 Exch. 111. But, looking at the subsequent correspondence, it is clear that the parties treated the original contract as subsisting throughout October and into November, and without any new contract being made the vessel was actually loaded in the latter part of that month. The contract would clearly have been performed in time, had the cargo been then carried. The delay having been for defendant's convenience, and practically at their request, the damages should be estimated as of the time when the contract was finally broken. These vessels could not have been got, as lake navigation was about to close for the season, and the only other mode of transportation was by rail. Plaintiff is entitled to the difference between the freight by rail, \$3.50 per ton, to Milwaukee, and 75c. by vessel, as per defendant's contract, and to addi-

tional cartage and charges. In any event he is entitled as damages to what it cost him to perform the defendant's contract in sending by rail enough salt to satisfy his consignee, which was considerably less than the whole cargo : *LeBlanche v. London & N.W. R.W. Co.*, L. R. 1 C.P. D. 286 ; *Hobbs v. London & S.W.R. W. Co.*, L. R. 10 Q.B. 111 ; *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 183, 184, 185, per Martin, B. ; *Simpson v. London & N.W. R.W. Co.*, L. R. 1 Q. B. D. 274 ; *Smeed v. Ford*, 1 El. & El. 602 ; *Gibbs v. Gildersleeve*, 26 U. C. R. 471. Plaintiff is also entitled to interest on the balance of cargo left on hand during the winter, and to shrinkage and extra insurance. Defendant's plea of payment into Court admits the contract as declared upon, and breaches as alleged : *Seaton v. Benedict*, 5 Bing, 32 ; *Wright v. Godard*, 8 A. & E. 144.

W. R. Mulock, contra. On the question of the right to appeal *Tanner v. Sewery*, 27 C. P. 53 ; *Nagle v. Latour*, 27 C. P. 137, and *Wilson v. Richardson*, 43 U. C. R. 365, may be referred to. The telegram of 11th October was an absolute refusal by defendant to carry out the contract : the plaintiff accepted it as such and acted accordingly. The damages, therefore, should be estimated as at that time ; and as the plaintiff could have then procured a vessel at \$1 a ton, and defendant paid the difference into Court, the plaintiff is not entitled to anything from them. If the contract was not cancelled by that telegram and was kept open, the defendant is entitled to such benefit as accrued to them during its continuance, and, therefore, defendant having used due diligence and carried the salt within a reasonable time, having due consideration for the perils and dangers of navigation, is entitled to a verdict, and to uphold the award : He referred to *Frost v. Knight*, L. R. 7 Ex. 111 ; *Taylor v. Great Northern R. W. Co.*, L. R. 1 C. P. 385 ; *Addison* on Contracts, secs. 946, 947. As to the general liability of carriers, see 37 Vict. ch. 25 (D.), and *Cluxton v. Dixon*, 27 C. P. 170. As to shrinkage, see *The Parana*, L. R. 1 P. D. 452, and 2 P. D. 118.

October 18, 1881. OSLER, J.—I am of opinion that as the parties have agreed by the terms of the submission that there shall be an appeal, an appeal well lies.

R. S. O. ch. 50, sec. 205, provides “that in the case of a *voluntary* reference to arbitration, where it is agreed by the terms of the submission that there may be an appeal to one of the Superior Courts, this Act shall apply, and an appeal shall lie in the same manner as in case of a reference under section 189.”

The latter section is, that under which the usual compulsory order of reference before trial, is made; and sections 191, 192, and 193, regulate the procedure on an appeal from an award made under such an order.

Section 195 provides for a compulsory reference of a cause at *Nisi Prius*; and sub-sec. (2) enacts that an appeal shall lie against an award made on such a reference “in the same way as if the reference had been under section 189.”

It was urged that section 205 related only to submissions out of Court, and did not embrace submissions by consent in a cause; but the language of the section is wide enough to include such submissions, and it becomes quite clear that this is its true construction, when the section as it now stands in the Revised Act above quoted, is compared with 39 Vic. ch. 28, sec. 10, from which it was taken. That section, instead of saying that an appeal shall lie as in case of a reference under section 189, provided that it should lie “as in case of a reference *in causes pending in Court*,” thus clearly contrasting voluntary references out of Court with compulsory references in a cause. See *Walker v. Beaver, &c. Ins. Co*, 30 C. P. 211; *Re Willson v. York*, 8 P. R. 313; *McCarthy v. Arbuckle*, 31 C. P. 405; *Burns v. Chamberlin*, 25 Grant, 148.

The objection to the appeal is, therefore, overruled, and I proceed to deal with it upon the merits.

The contract declared upon in the first count, is one to “inload” and deliver a cargo of salt for the plaintiff within a

reasonable time, and the learned arbitrator has found by his award that this was the contract between the parties. There is certainly room for arguing that the contract evidenced by the correspondence of the 2nd, 3rd, and 4th of October, read in the light of letters which passed between the parties before and after those dates, was one to inload and carry by a certain time, s. c., when the defendant's vessel should first arrive at Goderich, after leaving Kingston on the 4th October; or at all events not later than the end of that month. This, it appears, is the view which the arbitrator was disposed to take of it, if I may refer to his written judgment, which I find among the papers; but upon the whole, after a good deal of consideration, I cannot say that his award, finding the issues on this point in favour of the plaintiff, is wrong.

Treating it, therefore, as a contract to be performed within a reasonable time, what was a reasonable time would depend upon circumstances; it might have been the next trip of the vessel, or the plaintiff might have been willing to defer the performance for a second or third trip, so long as the cargo was carried during that season.

It is altogether probable that the parties anticipated and intended that the cargo should be carried by the end of October; but, on the other hand, it does not appear that this was a point the plaintiff laid much stress on, except as affecting the higher rate of freight he might have to pay if the defendant failed him.

I think the added pleas setting up a substituted contract are not made out. The only question is as to the measure of damages.

The contract was concluded on the 3rd October, the defendant agreeing to carry the plaintiff's salt to Milwaukee for 75c. per ton.

On the 4th of October the master of the defendant's vessel wrote to the plaintiff from Kingston: "Leave this a. m. for Goderich to load your salt."

On the 11th October the defendant telegraphed the plaintiff from Kincardine: "Erie Belle cannot go to Milwaukee,

will you take steam barge as substitute. Answer quick to T. M. Jones, Detroit."

On the 13th October, plaintiff telegraphed defendant: "Cannot give up Erie Belle. Have been depending on her." And he wrote on the same day: "As to Erie Belle, your captain telegraphed me from Kincardine if I could give him a cargo of salt. * * He offered to take 75c., which I accepted, so the ship is lawfully chartered. * * I will hold you responsible for what damages I may sustain. * * I have telegraphed Jones about vessels. * * Will let you know in a few days how things progress."

On the 20th October plaintiff writes again: "I telegraphed Jones according to your advice. I received an answer from him to say that he had failed, so far, to get a ship of any kind. * * Now, I don't want to be quarrelsome, and would like to settle this amicably. If you can get me a ship of about the same class as the Erie Belle, and at the same price, before the end of the present month—it may be the Erie Belle herself, as she has time enough to be back before that time,—I will accept such vessel in place of the charter I hold against her; but (if not) I will be forced to look after the Erie Belle for damages, which will not be less than \$250."

To this letter the defendant, on the 23rd October, replied from Kincardine that he was making enquires for a vessel to carry a load of salt for the plaintiff, "and if I don't succeed *will give you the schooner Erie Belle* on her return. She got into the canal yesterday. We have another cargo of grain from here to take to Kingston, but rather than have any misunderstanding will give her to you, if you insist upon it."

On the 24th October the plaintiff replied that he could not give full answer on that day, as he was looking after vessels in Detroit, Toledo, and elsewhere: that he had offers of two American vessels at \$1 per ton, which he had refused to take, as he could not afford to pay so high for salt, and he would write again in a couple of days.

On the 28th October he again wrote the defendant that he had failed to get a ship : that he was offered one at \$1 per ton but refused,—“I am now forced to get you either to send the Erie Belle, or one of same capacity and class, or pay the difference if I charter one at say \$1 per ton.”

On the 29th October defendant sent word to plaintiff that his vessel, the Erie Belle, would be at Goderich to take his salt as soon as she could get back from Kingston, and on the 30th he wrote him as follows : “The schooner Erie Belle is coming to Goderich to load your salt for Milwaukee ; should, wind and weather permitting,” arrive in about a week or ten days. *Thanking you for waiting,*” &c.

On the 11th November defendant wrote again : “The schooner Erie Belle left Port Colborne last night, will call at Cleveland to discharge 300 tons of pig iron and come to Goderich to load your salt, if you have not made any other arrangements. If you don't want her, or will kindly release her from the obligation, please do so, and answer me by telegram. But if you still want her to take your salt, she will take it.

In answer to this the plaintiff telegraphed the defendant on the 11th : “The Erie Belle must come here for my salt.”

The defendant's contention before the arbitrator and upon the appeal was, that his telegram of the 11th of October was an absolute unconditional refusal to carry out his contract, of which the plaintiff might and then should have taken advantage, and had he done so might have obtained a vessel at the rate of \$1.00 per ton, the difference between which and the rate agreed for with the defendant was the limit and measure of his damages. This was the view adopted by the arbitrator, who accordingly awarded in favor of the defendant upon the 9th plea, on which a sum to cover damages on that calculation had been paid into Court.

Frost v. Knight, L. R. 7 Exch. 111. is the case usually referred to. Cockburn, C. J., says, pp. 112, 113 : “The law

with reference to a contract to be performed at a future time where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 E. & B. 678, and *The Danube and Black Sea Co. v. Zenos*, 13 C. B. N. S. 825, on the one hand, and *Avery v. Bowden*, 5 E. & B. 714, *Reid v. Hoskins*, 6 E. & B. 953, and *Barwick v. Buba*, 2 C. B. N. S. 563, on the other, may be thus stated. The promisee, if he pleases, may treat this notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party, as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The same rule applies to a contract to be performed within a reasonable time: *Cherry v. Thompson*, L. R. 7 Q. B. 574.

In applying the law as laid down in these cases to the facts of the case before me, I have been unable to adopt the view taken by the learned arbitrator of the rights of parties.

In the first place, the defendant's telegram of the 11th of October invited an answer; therefore the subsequent correspondence must be looked at, and from the defen-

defendant's letters of the 23rd and 30th October and 11th November, it is clear that the agreement was kept on foot, although the defendant had deliberately refrained from performing it at a time when he could have done so, in order that he might obtain another and more profitable contract. I need only refer to the expressions in the letter of the 23rd: "if I don't succeed," *i. e.*, in getting another vessel with which the plaintiff will be satisfied, "will give you the schooner *Erie Belle*. * *

Rather than have any misunderstanding will give her to you, if you insist upon it." And in the letter of the 30th he thanks the plaintiff for waiting on him. I think it cannot be said that while this correspondence was going on, the plaintiff insisting on holding the defendant to his contract, and the defendant, after the telegram of the 11th October, agreeing to perform it, the plaintiff was under any obligation to look for another vessel, or to do anything which might abate the defendant's liability should he ultimately be unable or unwilling to send the *Erie Belle*.

Even if it can be said that the defendant's telegram of the 11th of October did amount to such a repudiation of the contract as to entitle the plaintiff at once to bring his action as for a breach of it, it appears to me that the delay which afterwards took place in obtaining a vessel may properly be said to have taken place at the defendant's instance, and with the view of saving him from loss, as, instead of adopting the alternative of paying the difference in rates, or the sum which the plaintiff specifies as his probable damage, he proposes to substitute another vessel satisfactory to the plaintiff, or to send the *Erie Belle* herself later on.

Some observations of Kelly, C. B., in the case of *Ogle v. Earl Vane*, L. R. 3 Q. B. 272, appear to me to be applicable. There the defendant failed to deliver iron which he had contracted to deliver by a certain time, and the plaintiff delayed going into the market for several months. There was evidence of correspondence between the parties

from which it might be inferred that the delay had been at the defendant's request, though there was no new binding contract. Kelly, C. B., says: "Can it be reasonably contended that that which has been called a rule of law as to the measure of damages, but which is rather a mere rule of practice, is to prevail under all circumstances? It would be contrary to common sense and justice where there has been a series of proposals involving delay by the defendant, for his own benefit, and acquiescence on the part of the plaintiff, that because there may be no binding contract varying the terms of the former contract, the plaintiff is to be tied down to the strict letter of the rule as to the measure of damages for non-delivery of goods, and not be entitled to the damages consequent upon the delay." See also *Smeed v. Foord*, 1 Ell. & Ell. 602.

It appears to me that in whatever way you look at the case the defendant is not entitled to ask for any abatement of the damages arising out of the fact that the plaintiff might have chartered, but did not charter, a vessel at the rate of \$1 per ton during the months of October or November.

In the end the salt was loaded on the defendant's schooner on the 25th November, but the Captain, in the exercise of his judgment, refused to sail, fearing bad weather, and it was then impossible to charter another vessel. The plaintiff, who had sold the salt in Milwaukee at \$5.25 per ton, arranged with the consignee to send him 200 tons by rail, and to pay him the difference between 41 tons which he had bought in Milwaukee at \$8, on account of the salt which the plaintiff should have delivered, and the contract price, \$112.75, reduced, however, afterwards to \$56.37. The freight paid to the railway was \$3.50 per ton, and a further charge of 50cts. had to be paid for cartage to carry the salt from the railway station to the place where it should have been delivered had it been carried by the schooner.

It appears to me that these items, the difference between railway and vessel freight, the difference in price of the 41

tons which the plaintiff's consignee purchased in Milwaukee, and the cartage, deducting therefrom the agreed freight, 75cts., make up the lowest measure of damages to which the plaintiff is entitled. See *Walton v. Fothergill*, 7 C. & P. 394; *Featherston v. Wilkinson*, L. R. 8 Ex. 122; *Crouch v. Great Northern R. W. Co.*, 11 Ex. 742; *Harvey v. Pass. & Conn. R. W. Co.*, 124 Mass. 421; *Higginson v. Weld*, 80 Mass. 165; *Gibbs v. Gildersleeve*, 26 U. C. R. 471.

The cargo remained in the vessel all the winter and was delivered at Milwaukee in the spring. A charge is made for shrinkage in bulk during the winter, owing to the leakage of the vessel dissolving the salt; but considering the manner in which the quantity loaded on board was estimated, and the fact that more or less of such shrinkage always occurs, I see no reason for differing from the learned arbitrator's finding as to this item.

Nor can I interfere with his finding upon the eighth plea to the second count. There is evidence which supports it. Mr. Garrow urged that by the plea of payment into Court the special contract declared on in that count was admitted, and if that had been the only plea the plaintiff would, of course, have been entitled to a verdict; but if pleas raising issues inconsistent with that plea are allowed to remain on the record, they must be disposed of separately, and the admission in the plea of payment into Court will not entitle the plaintiff to a verdict on the other issues: *Fischer v. Aide*, 3 M. & W. 486; *Twemlow et al. v. Askey et al.*, 3 M. & W. 495.

The award must, therefore, be amended by increasing the verdict for the plaintiff on the first count from 20c. to \$; and giving him the costs of the reference and award.

The plaintiff is entitled to the costs of this appeal.

Judgment accordingly.

MCKITRICK V. HALEY.

Insolvent Act of 1875—Composition deed—Validity—Joint and separate creditors—Pleading.

Action of debt by the plaintiff claiming under a deed of composition and discharge, as assignee of the assignee in insolvency of a co-partnership, whereby the debt in question was transferred to him. Plea, setting out the deed, whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them 50c on the \$ of their respective claims against the said insolvent firm, and on confirmation of the deed to pay the costs respecting the insolvent firm's estate * * and the preferential claims against the said firm, in consideration of which "the said creditors" released to the insolvents their claims against them, and directed a conveyance of the insolvent firm's estate to them, and plaintiff averring that at the time of the assignment of the debt to the plaintiff there were separate debts of the insolvent, or one of them, unpaid and unsatisfied, which were not provided for by the deed.

Held, that the deed provided for the payment of firm creditors only, and did not include separate creditors, and therefore that the plaintiff's title to the debt failed.

THE plaintiff sued as assignee of one Shaw, the assignee in insolvency of Robert H. McKitrick and Samuel H. McKitrick, insolvents under the Insolvent Act of 1875, to recover a debt due by the defendant to the insolvents. The question was, whether the deed of composition and discharge under which the assignee conveyed and transferred the estate of the insolvents, including the debt sued for, to the plaintiff, was valid.

The deed, which is sufficiently stated in the judgment, was set out at length in the fifth plea, which averred that the insolvents, of whom the plaintiff was one, were carrying on business as partners under the firm of McKitrick Brothers, and that at the time of the execution thereof, and of the assignment of the debt in question to the plaintiff, there were separate debts of the insolvents, or one of them, still unpaid and unsatisfied, which were not provided for by the deed.

Demurrer. That the plea was bad on the ground that by the deed of composition and discharge as set out in the plea, the separate debts of the plaintiff, and the said Samuel McKitrick, were provided for; and on other

grounds claimed to be sufficient in law to sustain said demurrer.

October 18, 1881. *Walsh*, for the demurrer. The description of the parties, the recital, and the operative parts of the deed, are in exactly the same terms in both deeds, as in the case of the deed in *Lewis v. Tudhope, et al.*, 27 C. P. 505. The only difference between the two deeds lies in the use of the words "Insolvent firm," in that part of the deed in this case providing for its confirmation, while the word "Insolvent" is made use of in *Lewis v. Tudhope*. From the construction of the whole it is plain that the separate creditors were intended to be provided for.

D. L. Scott, contra. The deed in *Lewis v. Tudhope* did not shew upon its face any intention to confine its application to the creditors of the firm, and the covenant was a covenant to pay all the creditors of the insolvent alike. In the present case, the deed shews clearly that its application was intended to be confined to the insolvent firm. The covenant is a covenant to pay the composition upon the claims against the insolvent firm alone; and it is to become effective on being signed by the required proportion in number and value of the creditors of the insolvent firm. Following the ordinary rules of construction, the deed can not be construed in such manner as to give the separate creditors any benefit under it. He cited *Re Garratt*, 28 U. C. R. 273; *Allan v. Garratt*, 30 U. C. R. 177; *Nicholson v. Gunn*, 35 U. C. R. 7; *Graham v. McKernan*, 42 U. C. R. 368.

October 28th, 1881. OSLER, J.—A deed of composition and discharge must embrace all classes of creditors, several as well as joint, where any of each class exist: *Rixon v. Emary*, L. R. 3 C. P. 546; *Ex parte Glen*, L. R. 2 Ch. App. 670; *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Allan v. Garratt*, 30 U. C. R. 177.

But if, "looking at all the provisions of the deed, we find a manifest intention that the composition shall be paid to all

the creditors, and the covenant is with all, it requires very little more to shew that the deed was intended to be made with all, and though there may be some ambiguity, we ought, if possible, to give effect to the deed so as to carry out that intention": *McLaren v. Baxter*, L. R. 2 C. P. at p. 553. And in *Lewis v. Tudhope*, 27 C. P. at p. 544, it is said that the rule now is to support these composition deeds, "if they are so framed as to shew an intention to provide for all creditors, and to comply with the provisions of the Act, and that upon a reasonable construction of the terms of the deed no creditor is excluded from the benefits provided by the deed."

The question to be determined is within which class of decisions the deed set out in the fifth plea comes. Is it limited to the creditors of the firm, or can it fairly be construed as providing for all classes of creditors, separate as well as joint?

It purports to be made between Robert J. McKitrick and Samuel McKitrick, theretofore trading under the firm and name of McKitrick Brothers, of the first part, and the several persons, firms and corporations, who are creditors of the insolvents, of the second part. It recites the inability of the insolvents to pay their debts: that their creditors have agreed with them for a composition and discharge upon the terms and in the manner thereafter mentioned, and that the insolvent Robert J. McKitrick has agreed to secure the payment of the creditors thereafter mentioned by his promissory notes, &c. The insolvent Robert J. McKitrick then covenants with all the creditors collectively and severally that he will pay to them, and each of them, respectively, a "compensation" of 50c. in the \$ of their respective claims against the said insolvent firm, at the times and in the manner set forth in the deed. He further covenants, upon confirmation of the deed, to pay the costs in insolvency respecting the insolvent firm's estate, and the preferential claims against the said firm, in consideration of which the said creditors release unto the insolvents all their respective claims against them, and direct and authorize

the assignee to deliver up and convey to the insolvent Robert J. McKitrick, "all the said insolvent firm's estate and effects, upon this deed being executed by a majority in number of the creditors of the said insolvent firm who had proved claims," &c. It is then declared that the deed is made in pursuance of the Insolvent Act of 1875, and shall be ineffectual, "unless and until it is executed by the aforesaid proportions in number and value of the said creditors of the insolvent firm's estate."

In *re Code and Crain*, 3 App. R. 555, a special case heard before the full Court of Appeal, it was held that where there are joint and separate creditors a deed of composition and discharge, though providing for all the creditors and dealing with all the estates, is invalid under the Act, unless the assent of the requisite proportions of the creditors of each class, joint and separate, was obtained.

It was urged by Mr. Walsh that as the covenant of Robert J. McKitrick is made with all the creditors "collectively and severally," the case of *Lewis v. Tudhope*, 27 C. P. 505, in which a deed containing a somewhat similar covenant was upheld, was an authority in his favour. The covenant there, however, was made by the insolvents themselves with all their creditors collectively and severally, and would therefore include the creditors of the firm and of the individual partners, and there were no restrictive words; while the deed in question here only provides for payment of the composition upon claims against the insolvent firm, and the payment of the preferential claims against the firm. It is "the said creditors," *i. e.*, the creditors of the firm, who direct the conveyance and assignment of the insolvent firm's estate to the plaintiff, and that is to be done upon the execution of the deed of composition and discharge by a majority in number and value of the firm creditors only.

It is as plain as possible that deed makes no provision for the separate creditors, and it would almost appear as if it had been carefully drawn so as to exclude them, or, at

all events, in the full assurance that there were no creditors of that class to be provided for.

The plaintiff's title, which depends entirely upon the deed, therefore fails, it being admitted by the demurrer that there were separate creditors. See *Nicholson v. Gunn*, 35 U. C. R. 7; *Graham v. McKernan*, 42 U. C. R. 368.

Judgment for defendant on demurrer.

JONES V. THE CANADA CENTRAL RAILWAY COMPANY.

Private Act—Effect of—Jurisdiction of Local Legislatures—Domicile of party affected—Pleading.

The plaintiff, being the holder of a debenture issued by the B. & O. R. W. Co. under 23 Vict. ch. 109, sued thereon. By the 27 Vict. ch. 57 the railway company were authorized to issue preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway, being at the time of Confederation a local work, the 31 Vict. ch. 44 (O.), was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and, amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By the 41 Vict. ch. 36 (D.), the B. & O. Railway Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. ch. 44 (O), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication, that the Act was not binding because it was a Private Act, and the plaintiff was not named therein, nor a petitioner therefor, nor were his rights specially taken away thereby. Fourth replication, that the Act was *ultra vires*, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act, beyond the jurisdiction of the Ontario Legislature.

Held, on demurrer, third application bad; for, though the Ontario Act was in the nature of a Private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby.

Held, also, fourth replication bad, for the Local Legislatures were not restricted by the decree "Property and civil rights in the Province" to legislation respecting bonds held therein, and that where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.

DECLARATION, that the Brockville and Ottawa R. W. Co., on 2nd July, 1860, by their "debenture transferable," overdue, issued under 23 Vic. c. 109, in consideration of £100 stg., promised to pay to bearer £100 stg. 20 years after 1st July, 1860; and afterwards said R. W. Co., by an Act of the Dominion of Canada, became amalgamated with defendants, and defendants thereby became liable to plaintiff (the bearer) for the amount of the said debenture; and although plaintiff became holder of said debenture before this action, neither the B. & O. R. W. Co. nor defendants, as their successors, paid the same or any part thereof.

Third plea: That after the alleged claim accrued, and before action, by an Ontario Act, entitled "An Act for the conversion of the ordinary Bonds and old Stock of the Brockville and Ottawa Railway Company into reduced new Stock, and for other purposes," the liability of the said B. & O. R. W. Co. to pay said debentures in money wholly ceased: that said debenture was one of a certain class of bonds designated in said Act as ordinary bonds, and it was provided by said Act that, from and after the passing of said Act, the holders of such ordinary bonds should have no claim upon said B. & O. R. W. Co., at law or in equity, in respect of said bonds, except for the conversion of said bonds into new paid-up stock in the capital of said B. & O. R. W. Co., as authorized by said Act, at the rate of twenty-five cents in the dollar on the amount of such bonds and of the coupons thereto attached; and said B. & O. R. W. Co. always were ready and willing to issue to said ordinary bondholders certificates of proprietorship of fully paid up shares in new stock proportionate to the amount of said bonds. And by the Act of Parliament of Canada in the declaration mentioned, whereby the B. & O. R. W. Co. became amalgamated with defendants, it was amongst other things enacted that the stock of the amalgamated company, these defendants, should be allotted to the stockholders of the said two companies, in the case of the B. & O. R. W. Co., at the par value of the existing stock of said company, including the stock which was due to the former creditors

of said company and had not been received by them in exchange for their claims; and the defendants, since the said amalgamation, have always been ready and willing, on surrender of said debenture in the declaration mentioned, to allot to the plaintiff, or other holder of said debenture stock in defendants' company, at the par value of the stock of the said B. & O. R. W. Co. existing at the time of said amalgamation, but neither plaintiff nor any other holder of said debenture has ever demanded the said stock.

Replication: That the Ontario Act mentioned in said plea was null and void and of no effect, so far as plaintiff's rights were concerned, upon said "debenture transferrable," because said Act was *ultra vires* said Legislature, inasmuch as in said Act the plaintiff, or the holder of the said debenture transferable at the time of passing of said Act, was not specially named therein, nor a petitioner for or a party to said Act, which was in the nature of a private act, nor were their or either of their rights specially taken away or limited by said Act or under the Act of the Parliament of Canada mentioned in said plea. That, at the time of the passing of the Ontario Act, said debenture transferable was payable at London, England, and was there domiciliated, and the holder or bearer thereof resided in England, beyond the jurisdiction of the Legislature of Ontario, and said holder or bearer of said "debenture transferable" had no notice or knowledge of said Act and was not a party to the passing of said Act, and said Act did not affect, nor did the subsequent Act of the Parliament of Canada affect or limit any rights upon said debenture transferable or any property therein.

Demurrer: That the Ontario Act was not *ultra vires*, and the rights of the plaintiff as holder of said debenture transferable, or ordinary bond, were determined and fixed by said Act; and the liability of defendants in respect to said debenture transferable, or ordinary bond, was also thereby determined, and plaintiff was limited to the rights thereby given.

October 11th, 1881. *Watson* for the demurrer. The Canada Central, originally the Brockville and Ottawa Railway, is a local undertaking within the meaning of subsec. 10, sec. 92, of the Confederation Act. The Provincial Act in question is therefore *intra vires*.

G. A. Mackenzie contra. Though the Act may be *intra vires* as to holders of bonds living in the Province at the time of its passing, it is *ultra vires* as to those not living in the Province. The bond in question was held by a resident of Great Britain at the time the Act was passed; it was therefore not "property" or a "civil right" within the Province. See *Re Goodhue*, 19 Grant, 454; *In re Ewin*, 1 C. & J. 156; *Sill v. Worswick*, 1 H. Bl. 690. The bond is payable in London, England, in sterling money; and the contract is therefore an English, not an Ontario, contract: *Curtis v. Leavitt*, 15 N. Y. 85-88. On the principles of international law, legislation at the domicile of the debtor cannot extinguish this debt: *Re Goodhue*, 19 Grant 454; *Montgomery v. Bridge*, 2 Dow & Cl. 297; *Wharton's Conflict of Laws*, sec. 528; 2 *Kent's Com.*, 9th ed., 503; *Robinson v. Bland*, 2 Burr. 1077, 1078. See also, *Gebhart v. Canada Southern R. W. Co.*, reported in the Albany Law Journal, May, 1881. The foreign bondholders are not sufficiently indicated in this Act, it being simply to confirm an agreement between certain persons mentioned in the preamble. See *Re Goodhue*, 19 Grant 449-451.

November 1st, 1881. OSLER, J.—The Brockville and Ottawa Railway Company was incorporated by Acts of the Parliament of the old Province of Canada, 16 Vict. ch. 106, and 18 Vict. ch. 183.

By 23 Vict. ch. 109, a special form of debenture was provided for an authorized debenture issue of £350,000 stg., referred to in subsequent legislation as "ordinary bonds."

These debentures were, by the Act, declared to be a charge upon the lands, tolls, and revenues of the company next after a preferred charge in respect of a loan made to the company by the municipalities through which the road passed.

They were made payable twenty years after the date mentioned therein, with interest at the rate of six per cent. per annum, to be paid on the first days of January and July in each year, upon presentation and surrender of the proper coupons thereto attached at the office of
in the city of London, England.

The debenture mentioned in the declaration is one of these debentures.

By the 27 Vict. ch. 57 (1863), the preamble of which recites that the company, by reason of financial embarrassments, had for a long time been unable to pay the interest upon their mortgages and bonds, and that it was expedient to provide by legislation for the reorganization of the company, whereby the extension of the road might be secured and a sacrifice of the interests of the municipal, bond, and other creditors avoided, the company were authorized to issue preferential extension bonds for £60,000 stg., to be applied to the special purposes mentioned in the Act, and to execute a mortgage upon the railway and works to secure such bonds, which should form the first charge thereon, next after and subject to the claims of the municipalities.

The railway being, at the time of the confederation of the Provinces, a local work or undertaking situate wholly within the Province of Ontario, the power to legislate in respect of it after that time belonged to the Provincial Legislature, which, in 1868, passed an Act (31 Vict. ch. 44) intituled, "An Act for the conversion of the ordinary Bonds and old Stock of the Brockville and Ottawa Railway Company into reduced new Stock, and for other purposes." The preamble recited the 27 Vict., ch. 27, and that, owing to alleged default in payment of the interest on the preferential extension bonds, the trustee under the mortgage had taken possession of the railway and was about to foreclose and sell the road in consequence of such default, and that under that Act all outstanding liabilities of the company had been or were convertible into ordinary bonds of the company, ranking next after the preferential extension

bonds: that the interest on the ordinary bonds of the company was accumulating, and a financial reorganization of the company sought: that it had been mutually agreed by and between the preferential bondholders, and a large majority in value of the ordinary bondholders, and by three-fourths in value of the shareholders, that such reorganization should be carried into effect upon the terms of the memorandum set forth in the preamble; and that an Act of the Legislature was required to carry such agreement into effect.

The Act then (sec. 1) reduced the capital stock of the company to \$500,000, or such other sum, more or less, as should be sufficient to cover the outstanding ordinary bonds, or claims convertible into such, and the existing paid-up stock converted at the rate of ten cents in the dollar.

By section 2 ordinary bonds held by preferential extension bondholders at the date of the passage of the Act of 1863, were converted into new paid-up stock, at the rate of fifty cents in the dollar on the amount of such ordinary bonds and coupons overdue thereon, and the remaining ordinary bonds, with overdue coupons, were converted into new paid-up stock, at the rate of twenty-five cents in the dollar.

Section 6 enacted that the conversion provided for should take effect immediately after the passage of the Act, and that the management and possession of the railway should, within four weeks thereafter, be restored by the trustee of the preferential extension bondholders to the company.

By section 8 the right of these bondholders to foreclose their mortgage, or otherwise to dispose of the road thereunder, was forever extinguished; and the 7th section enacted that from and after the passing of the Act the ordinary bondholders should have no claim upon the company, at law or in equity, in respect of these bonds, except for the conversion of the same into new stock.

The claim of the municipalities was not interfered with.

In the year 1874, Acts were passed by the Legislature of the Province and the Parliament of the Dominion, which

authorized the transfer to the Canada Central Railway Company of the claim of the municipalities in satisfaction of the claim of that company against the Province (see *Canada Central R. W. Co. v. The Queen*, 20 Grant 273), and the Brockville and Ottawa Company were authorized to issue bonds called preferential mortgage debentures for the amount of such liability, which debentures it was enacted should rank *pari passu* with the preferential extension bonds issued under the Act of 1863. and form with them a first charge upon the railway.

The last Act necessary to be referred to is 41 Vict. ch. 36 D. (1878), intituled, "An Act to amend the Act incorporating the Brockville and Ottawa and the Canada Central Railway Companies, and to provide for the Amalgamation of the said Companies."

This Act (section 1) declared the Brockville and Ottawa Railway to be a work for the advantage of Canada.

Section 2 empowered the two companies to amalgamate under the name of the Canada Central Railway Company.

Section 4 invested the amalgamated company with all the rights, powers, franchises, and property of both companies, specified in, and in them vested by, the several Acts relating to the companies; and provided that the amalgamated company should be liable for all the debts, duties, and obligations of both companies.

The 7th section declared that the existing preferential liabilities and liens should not be affected; and the 8th provided that the stock of the new company should be allotted to the stockholders of the old companies,—in the case of the Brockville and Ottawa Company, at the par value of the existing stock of that company, including the stock, if any, due to the former creditors of the company, and which had not been received by them in exchange for their claims.

The plaintiff sues as the holder of one of the ordinary bonds issued under the Act of 1860, and the defendants in effect say that the liability of the Brockville and Ottawa Company thereon was extinguished by the Ontario Act of

1868, and that they are and have always been ready and willing to exchange such bond for reduced new stock, as provided by that Act and the Dominion Act of 1878.

In the third replication the plaintiff contends that the Act of 1868 is void and of no effect as regards him, and is *ultra vires* the Ontario Legislature, because such Act is in the nature of a private Act, and the plaintiff, or the holder of the debenture, at the time of passing the Act, was not specially named therein, or a petitioner for or a party to the Act, nor were his rights specially taken away or limited by that Act or the Dominion Act of 1878.

The fourth replication alleges that the Act is *ultra vires*, because, at the time it was passed, the debenture in question was payable in London, England, and was there domiciliated, and the holder or bearer thereof then resided in England, beyond the jurisdiction of the Ontario Legislature, and had no notice of and was not a party to the passing of the Act.

These are the replications demurred to.

The question really intended to be raised by the third replication is not, as it rather inaccurately states, whether the Act of 1868 is *ultra vires* the Ontario Legislature, but whether the plaintiff is brought within its operation or affected by its provisions.

I must say that it seems to me quite clear that he is.

The Act is, no doubt, in the nature of a private Act, and therefore does not affect the rights of persons not therein mentioned or referred to: Interpretation Act, R.S.O. ch. 1, sec. 8, subsecs. 36, 46; but I cannot agree that it was necessary, in order to make it binding upon ordinary bondholders, that they should all be referred to or mentioned therein by name. Subsection 46 is simply declaratory of the well settled principle of construction of private Acts, that no one shall be bound thereby whose rights and interests do not clearly appear therefrom to have been considered and dealt with by the Legislature: *Re Goodhue*, 19 Grant 366; *Metropolitan Asylum District v. Hill*, L. R. 6 App. Cas. 193.

The intention to legislate in regard to such rights and

interests may be as plainly expressed by reference to the owners as a class as by referring to them as individuals, and it may be quite impossible, as I have no doubt it was in this case, to specify them all by name. One of the expressed objects of the Act is, to provide some relief for the ordinary bondholders, and to save for them, if possible, something out of the wreck of an hopelessly insolvent concern. The best way, in the opinion of the Legislature, to effect this was to validate the scheme which the large majority in value of such bondholders had approved of; and this they accordingly profess to do by the Act in question.

Their power to do so, if otherwise exercised within the limits of the Confederation Act, was absolute; and the plaintiff, who is an ordinary bondholder, cannot, in my opinion, impeach it.

The question raised by the fourth replication is a more serious one, and I would gladly have referred it to the full Court had I been at liberty to do so, as a decision affecting the powers of either Legislature under the Constitutional Act ought to have all the weight it would derive from being the opinion of the full Court, or of the Court of Appeal. But, as I am now obliged to decide all matters coming properly before me, I must dispose of this question here, with the satisfaction however of knowing that if my opinion is erroneous, it can speedily be corrected elsewhere.

It is argued that the Act is *ultra vires* as regards the plaintiff, because, at the time it was passed, the debenture was domiciliated out of the Province of Ontario, *i. e.*, in England, where the holder thereof resided, and therefore was not, within sec. 92, subsec. 13, B. N. A. Act, property or civil rights within the Province so as to be the subject of legislation by the Provincial Legislature, and many authorities were cited to enforce the application of the maxim *mobilia sequuntur personam*. Some of them are referred to, and their result expressed by Strong, V.C., in *Re Goodhue*, 19 Grant, at p. 454: "It has been determined in the English Courts, by decisions never reversed and

which must, I conceive, give the law to us, however much foreign jurists and writers may differ on the point, that the locality of a debt is at the domicile of the creditor."

The rule, however, is not of universal application, and in the case of *Nickle v. Douglas*, 35 U. C. R. 126, S. C., in App., 37 U. C. R. 51, on a question arising as to the construction of the Assessment Act, it was held not to govern.

I may here refer to the recent case of *Re Cigalas Settlement Trusts*, L. R. 7 Ch. D. 351, as confirming the view of the learned Chancellor, now the Chief Justice of Ontario, in *Re Goodhue*, 19 Grant, at p. 418, that where property is settled in trustees the governing domicile is that of the trustees and not of the beneficiaries.

The argument for the plaintiff, pushed to its legitimate extent, would, if well founded, go a long way to minimise the powers of the Legislature in respect of Provincial railways or other works. For the purpose of financial operations, of raising means to construct, equip, maintain, or extend the road, the bonds or debentures of the concern are frequently, and I suppose as a rule, made payable abroad. Equally, as a rule, it has unfortunately been found necessary, in order to avert the total loss of their capital by the original, or the first, second or third preference bondholders, to carry on the work, or procure additional capital, by rearranging, consolidating, and postponing or reducing the bonded debt. The continued existence of the road, either as a going concern, or one in which the original creditors shall any longer have an interest, may depend upon some scheme of this kind being legalized by the Legislature, where it is not within the powers conferred by the charter of the company, or where the requisite consent of every creditor cannot be obtained. All Acts of this kind, whether they relate to railways or any of the other numerous undertakings incorporated or chartered by the Provincial Legislature, must, in one sense, affect property and civil rights out of the Province when any of the creditors of the company do not reside therein. Whether they defer, reduce, or entirely extinguish the debts they profess to deal with, is

merely a question of degree. They must therefore be *ultra vires* as regards such creditors, and so practically useless, if subsec. 13 of sec. 92, B. N. A. Act, is the limit of Provincial powers, and the legal fiction or maxim already adverted to is applicable.

I hesitate to adopt so narrow a construction of the section.

To quote again from *Re Goodhue*, 19 Grant, at p. 418, per Spragge, C.: "The true principle I take shortly to be that, under the Confederation Act, there has been a federal, not a legislative union: that to the Provincial Legislature is committed the power to legislate upon a range of subjects which is indeed limited, but, within the limits prescribed, the right of legislation is absolute."

One of the matters in relation to which the Provincial Legislature may make laws [is local works and undertakings, with certain exceptions not affecting this case. Section 92, sub-section 13.

The scope of these words, "in relation to," is extremely wide.

Property and civil rights within the Province is also one of the matters assigned exclusively to the Provincial Legislatures; yet it is well settled that the Dominion Parliament may legislate with respect thereto where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters exclusively within their own legislative authority: *The Niagara Election Case*, 29 C. P. 261; *Valin v. Langlois*, 3 Sup. C. R. 1; *Cushing v. Dupuy*, L. R. 5 App. R. 419.

If the powers conferred upon the Provincial Legislature are to be effectually exercised, they must, I think, receive a not less liberal construction.

The Act of 1868 is certainly an Act relating to what was at the time of its passage a local work or undertaking, nor is it less so because it only deals with the debts and liabilities of the company.

If I am to hold that it is paralyzed merely because some or all of these debts were payable to creditors resident out

of the Province, and were therefore not property or civil rights in the Province, I do not see that I can stop short of the conclusion that no legislation of this kind, of which, be it said, our statute books are full, can safely be obtained except from the Dominion Parliament.

I do not think the powers of the Provincial Legislature are so much circumscribed.

I am of opinion that where debts or other obligations arise out of or are authorized to be contracted under a local Act which is passed in relation to a matter within the powers of the local Legislature, such debts or obligations may be dealt with or affected by subsequent Acts of the same Legislature in relation to the same matter, and this notwithstanding that by a fiction of law such debts may be domiciled out of the Province.

I have not overlooked the case of *Gebhardt v. The Canada Southern R. W. Co.*, 21 Albany Law Journal, p. 352.

There the defendants, a Dominion railway company, had issued bonds payable in New York. In an action in the Southern Circuit Court of the District of New York upon one of these bonds, to recover the interest, the defendants set up an Act of the Dominion Parliament, 41 Vict. ch. 27, authorizing them to substitute new bonds at a reduced rate of interest. It was held that the defence was not available, (1) because the law of the place of the performance of the contract, and not the place of its execution, governed, and this law could not be affected by extra-territorial legislation; (2) because the Act of the Dominion Parliament was invalid, on the ground that it violated fundamental principles of justice; and (3) because it violated the fundamental principles of the Federal law.

So far as the Courts of this Province are concerned, I apprehend that it would not have been possible for them, had that action been brought here, to have adopted the conclusions of the New York Court. We could only have considered whether the Act was *ultra vires* the Parliament which passed it, and, if a private Act, whether the plaintiff was within its operation.

These are the questions arising for decision in the present case, and I have determined them in favour of the defendants.

Judgment for defendants on demurrer.

REGINA V. PALMER.

Liquor License Act—Sale of the licensed premises—Conviction.

The defendant was licensed to sell "in and upon the premises known as the Palmer House." The Palmer House stood upon the front part of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground, immediately within which enclosure the defendant sold liquor, for which he was convicted.

Held, that as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the hotel, it was not covered by the license, and the conviction was right.

The defendant was convicted for selling liquor without a license, and the conviction having been removed into this Court by *certiorari*,

Murphy moved for a *rule nisi* to quash it.

Fenton, County Attorney, shewed cause in the first instance, and

Murphy supported his motion, referring to *Frazer* and *The Inspector of Licenses of the County of Elgin*, 17 C. L. J. 346.

Nov. 4, 1881. OSLER, J.—The defendant is a licensed tavern-keeper, and the only question argued was, whether the sale for which he was convicted, took place on the premises licensed. By the license he is authorized to sell "in and upon the premises known as Palmer House, in the village of Richmond Hill."

Upon the evidence returned with the *certiorari*, I can-

not say that the magistrates were wrong. The defendant's house stands on the front part of a lot of ground of which he is the owner. The lot is a very long one, and the rear part has for many years been used as a fair ground. Facing the fair ground, and as I understand it, opening thereon is a booth, the back of which forms part of a fence which separates the fair ground from the yard in rear of the hotel. The distance between the nearest out-building of the hotel and the booth is fifty yards. It does not appear that the latter is used at all in connection with the hotel.

A witness said that on the 24th May last, he attended bar at the booth, sold beer there, and was paid for it. The defendant admitted that this was done by his order, and that he had sold there for several years past, believing that his license warranted him in doing so.

It is not necessary to decide whether a sale on any part of the premises, yard, outbuilding, stables, &c., used in connection with the hotel, would be covered by the license. There is nothing in the evidence before the magistrate here to show that the place where the liquor was sold was really part of the hotel premises, beyond the fact that it was part of the same lot of land on which the hotel stood, and belonged to the defendant. That does not necessarily make it part of the hotel premises; and in fact it seems to have been used and enclosed for wholly different purposes. I think there was quite enough to justify the magistrates in finding that the sale did not take place on the premises licensed.

I was referred to a case decided by the learned Judge of the County Court of the County of Elgin, reported 17 C. L. J. 346, in which it was held that a license gave the licensee the right to sell liquors not merely on the hostelry but also in buildings in its vicinity, on the same premises, and within the same enclosure. If I rightly understand the facts of that case, I am disposed to agree with it, but the case before me is quite different.

Rule refused.

ROBERTS V. CLIMIE—MURPHY V. CLIMIE.

Demurrer—Libel—Privilege—License Commissioners' resolution ultra vires
—R. S. O. ch. 181.

Claim: That the defendant, an Inspector of Licenses, falsely and maliciously published of the plaintiff a circular which he caused to be sent to all licensed victuallers, &c., in the Riding, containing the following words: "W, R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, &c., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family or household of the said parties." **Defence:** That the Commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, &c., to any person who has the habit of drinking intoxicating liquors to excess, or the wife, &c., of such person, or any person concerning whom notice had been given to the landlord by the husband, &c., of such person, or any Justice of the Peace or Inspector, that such person is in the habit of drinking," &c.: that the licenses were issued to the persons to whom the notices were addressed subject to the right of suspending them for breach of the resolution. And the defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution.

Held, on demurrer, that the License Commissioners had no power to pass the resolution, and therefore that the defence was bad, for the communication was not privileged, and the defendant's belief in the validity of the resolution could not create any privilege.

DEMURRER to part of the statement of defence.

The statement of claim alleged that the defendant, who was Inspector of Licenses for the North Riding of the County of Perth, falsely and maliciously printed and published of the plaintiff a notice or circular, which he caused to be sent to all the licensed hotel and shop-keepers in the Riding, containing the following words: "William Roberts" (and other persons named), "are in the habit of drinking intoxicating liquors to excess, and you (meaning the licensed hotel and shop-keepers) are hereby notified that you are not to sell, give, barter, or otherwise dispose of intoxicating liquor of any kind to the said parties, or the wife, husband, child, employee, agent, or any member of the family or household of the said parties.

Statement of defence: 2. That the license commissioners for the North Riding of the county of Perth,

in good faith and intending to act within the scope of their power as to the regulation of taverns and shops, on the 15th March, 1881, passed a series of resolutions of which the following was one: "It is resolved and declared that no intoxicating liquors shall, under any pretence whatever, be sold, given, bartered, or otherwise disposed of in or about the premises of any tavern, inn, house of entertainment, or shop, to any person who has the habit of drinking intoxicating liquors to excess, or the wife, husband, child, employee, agent, or any member of the family or household of such person, or to any person concerning whom notice either verbal or written has been given to the keeper, landlord, or licensee of any such tavern, &c., by the husband, wife, child, guardian, or master of such person, or any justice of the peace, or inspector of the district, that such person is in the habit of drinking intoxicating liquors to excess; nor shall any intoxicating liquor be sold, bartered, or given away as aforesaid to any person in or about the premises of any tavern, &c., after a notice in writing has been served upon the keeper, &c., thereof, by the husband, wife, or child, of any such person forbidding such sale, bartering, or giving away of such intoxicating liquors as aforesaid.

3rd. The licenses were issued by the commissioners to the persons to whom the notices were addressed by the defendant, subject to the right of suspending or cancelling the license of any one guilty of violating the foregoing resolution or any others.

4. That license holders became bound by their respective bonds, on getting their respective licenses, to observe and abide by the said resolutions.

5. The defendant, as license inspector, became possessed of such information, and had brought before him such complaints that it became his imperative duty to enforce the said resolution; and that this should be done only where the said license holders had clearly violated the same wilfully, and that the necessity of any needless preventatives might be avoided, (*sic*) he caused the said

license holders to be warned in the manner complained of by mailing as alleged the said circular.

6. The defendant in so doing acted in good faith, without any malice of any kind.

7. The wife of the plaintiff before said circular issued requested the police officers aiding the defendant to take such steps as would prevent the plaintiff getting intoxicating liquors.

Demurrer.—The license commissioners had no power to pass said resolution, and as passed, it imposed no duty on the defendant; and in publishing the circular in the manner complained of, he did so without privilege, &c.

Robinson, Q. C., for the demurrer. The defence must depend on the validity of the resolutions. If they were unauthorized there was no privilege such as the defendant claims, and even if valid, that imposed upon him no duty. If the Provincial Statute empowered the Commissioners to pass such resolutions, the legislation is *ultra vires*: *Regina v. Hodge*, 46 U. C. R. 141. But, assuming that the Act is *intra vires*, it does not authorize the resolutions in question. It allows the commissioners to pass resolutions "for regulating the taverns and shops to be licensed." R. S. O. ch. 181, sec. 4, sub-sec. 4. But these regulations must be reasonable and not opposed to the general law: *Regina v. Belmont*, 35 U. C. R. 298. The statute itself, sec. 90, shews what the Legislature considered reasonable with regard to the matters provided for, and those resolutions in many respects go much further, and are plainly unreasonable and illegal. This should be regarded as a conclusive test: *Ballagh v. Royal Ins. Co.*, 5 App. R. 107; *Butler v. Standard Ins. Co.*, 4 App. 399.

Trevelyan Ridout, contra. There are two points to be considered in this case—(1). Had the license commissioners power to pass a resolution of the kind, so that the defendant's circular was privileged? (2.) If not, did their good faith in passing such a resolution, and that of the inspector in carrying it out, render the communication privileged?

As to the first point, the commissioners had power to pass such resolution. The case of *Regina v. Hodge*, relied on by Mr. Robinson, does not apply. The passing of such a resolution is not legislation of the kind declared *ultra vires* in that case. The scope of the liquor law—viz., to lessen the evils of intemperance—must be looked at. R. S. O. ch. 181, sec. 90, makes tavern-keepers liable in damages for selling liquor to intemperate persons after notice. The object clearly is to *prohibit* the sale to them, not merely to enable certain individuals to recover damages therefor. No liquor should be sold to such persons. See *Austin's Jurisprudence*, p. 103. A tavern-keeper is not ordinarily liable. His liability is, therefore, a penalty; the act of selling to such persons, is therefore prohibited. The resolutions may be *ultra vires* as to penalties, but not as to the conditional grant of a license. By sec. 4, sub-s. 1, R. S. O. ch. 181, the commissioners may make conditions and qualifications respecting issue of licenses by them. In making such a regulation as the one in question, the commissioners were only carrying out the spirit of the law, which is clearly directed against the sale to habitual drunkards. Tavern and shop-keepers contravening the regulation would be violating the law, and would therefore be improperly trusted with the sale of liquor. The commissioners are bound to refuse licenses to such persons. They may impose the condition upon parties receiving licenses of observing and keeping what is evidently ordered by the law, and the licensees undertake to observe the condition. The defendant was only giving effect to a proper regulation, and his communication was therefore privileged: *Henwood v. Harrison*, L. R. 7 C. P. 622; *Toogood v. Spyring*, 1 Cr. M. & R. 193, per Parke, B. As to the 2nd point. Even if the resolutions were illegal, the defendant in the *bonâ fide* exercise of belief of duty, may claim the communication made by him to be a privileged one, and so protected. Sec. 4, sub-sec. 5, R. S. O. ch. 166, gives the commissioners power to prescribe his duties as inspector; and they do so, as far as he knows, with full

authority. Sec. 97, R. S. O. ch. 166, compels him to carry out the provisions of the Act, and he does so as well as he can. There was an Act of a Legislature to an ordinary mind clearly having authority to legislate in the premises, admittedly with absolute power to legislate in all matters specially assigned to it by the B. N. A. Act, among which was tavern and shop licenses. If possessing such power, it was apparently entitled to delegate the power to make rules in matters of detail connected therewith, purporting to give such power. There was a regulation of the commissioners, passed in pursuance of such Act, in effect directing him to do as he did. He acts in what he deems the fairest way for all parties. The publication was not broadcast, but made by circular privately addressed to those having a duty under the Act. Defendant acting *bona fide* and in the discharge of what he believed, and had reason to believe, to be his duties, is clearly protected: *Harrison v. Bush*, 5 E. & B. 344; *Toogood v. Spyring*, 1 Cr. M. & R. 193, per Parke, B.; *Whitely v. Adams*, 15 C. B. N. S. 392; *Starkie on Slander*, pp. 526, 527; *Henwood v. Harrison*, L. R. 7 C. P. 617, per Willes, J.; *Taylor v. Hawkins*, 16 Q. B. 321.

October, 25, 1881. OSLER, J.—The defendant does not contend that the facts stated in the paragraphs of the statement of defence demurred to, form an absolute justification: in other words, that they shew the libel complained of to be privileged absolutely, in the sense that language written or spoken in the course of judicial proceedings is privileged.

A qualified privilege only is claimed, which, if it exists, will protect the defendant in the absence of actual malice, the burden of proving which will be cast upon the plaintiff. Such a question as this could not formerly have been raised by demurrer, and I think it should not be so raised now. A demurrer under the present system is useless when the whole question between the parties is not raised upon it, and when the dispute cannot be decided without

going into evidence: *Leyman v. Latimer*, L. R. 3 Ex. D. 352. Here, if I should come to the conclusion that the privilege exists, the plaintiff may still shew that it has not been used in a privileged way. If it does not exist the question of libel or no libel is yet one of fact for the jury. The case must go to trial either way, and I only regret that I did not refer it, as I have done in other instances, to the Judge at the Assizes, where the whole question between the parties could have been disposed of.

The only question I have to determine is, whether the occasion was privileged, and that depends, in my opinion, upon the validity of the resolution of the license commissioners set out in the third paragraph of the statement of defence. If the resolution was invalid, no duty, legal or moral, could, as it seems to me, be cast upon the defendant to publish the notice complained of; and apart from such duty he had no interest in the matter. It has indeed been argued at the bar that whether the resolution was or was not valid, yet if the defendant honestly believed it was valid, and honestly intended to act and believed he was acting under it, he would be protected. I cannot, however, agree to that proposition. The honest belief, that is, the real actual belief, of the defendant becomes important in the enquiry as to actual malice when the occasion is privileged; but the privilege is not created merely by the defendant's belief of its existence.

To quote again the oft quoted language of Lord Campbell on this subject: "A communication made *bona fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained criminary matter, which, without the privilege, would be slanderous and actionable." "Duty," in this canon, "cannot be confined to legal duties which may be enforced by action, indictment, or mandamus, but must include moral and social duties of imperfect obligation." *Harrison v. Bush*, 5 E. & B. at p. 348. In the

head note to the report it is said, under a *semble*, that this applies when the communication is made to a person not in fact having such interest or duty, but who might reasonably be, and is supposed by the party making it to have such interest or duty; as, for example, if it had been held that the memorial, the publication of which was complained of in that case, had been improperly sent to the Home Secretary instead of to the Keeper of the Great Seal.

I may refer also to the recent cases of *Holliday v. Ontario Farmers' Insurance Co.*, 1 App. R. 483; *Clark v. Molyneux*, L. R. 3 Q. B. D. 237; *Purcell v. Sowler*, L. R. 2 C. P. D. 215; *Stevens v. Sampson*, L. R. 5 Ex. D. 53; *Goffin v. Donnelly*, L. R. 6 Q. B. D. 307, and *Usill v. Hales*, L. R. 3 C. P. D. 319, in which the application of the rule as to privileged communications of various kinds, under differing circumstances, has been discussed.

It may be said that it is hard upon the defendant, who relied upon the validity of the resolution of the license commissioners in this case, that he should suffer for their error, if there be one. On the other hand, it was no light matter for the plaintiff to be published throughout his county as an habitual drunkard. Nor can it be overlooked that the defendant, in giving the notice complained of, must have acted very much upon his own responsibility, as there is nothing in the resolution which makes it imperative upon him to do so.

The 97th section of the Act, R. S. O. ch. 181, does not assist him, for that merely says that it shall be his duty to see that the provisions of the Act are duly carried out; and the fact stated in the 4th paragraph of the statement of defence, that the license holders became bound to abide by the resolutions and observe the same, does not assist him either, if there was no corresponding duty on his part to give the notice complained of, for they would only be bound to obey the lawful regulations of the commissioners: *Snell and The Corporation of the Town of Belleville*, 30 U. C. R. 1. The power of the

license commissioners to pass the resolution depends upon section 4 of the Act, which enacts that they may "pass a resolution for determining the matters following, that is to say, * * sub-sec. (4). for regulating the taverns and shops to be licensed."

Upon well understood principles of construction such resolutions must be consistent with the scope and object of the Act, and must not be repugnant to the general law. They must not, under the guise of regulations, undertake to legislate by prohibiting what is not forbidden by the Act or by the general law, and they must be reasonable in themselves: *Ipswich Tailors Case*, 11 Co. 54 a; *Calder and Hebbe Navigation Co. v. Pilling*, 14 M. & W. 76.

In *Regina v. Belmont*, 35 U. C. R. 298, it is said that the power to pass by-laws for regulating the houses or places to be licensed, means regulations in respect of the sale of spirituous liquors therein, the hour and time at which they may be sold or prohibited, with reference to the accommodation of guests, and in respect of gambling therein and not allowing disorderly persons to frequent the premises. "It fairly means nothing more than making general regulations respecting the conduct of the house:" In *re Barclay and The Municipality of Darlington*, 12 U. C. R. 86, 96. Under the more extended provisions of the present Act, it may of course be found that other matters may properly form the subject of regulation, but what I have quoted will illustrate the general scope of such a provision.'

In *The London and Brighton Railway Co. v. Watson*, L. R. 3 C. P. D, 429) Lord Coleridge was of opinion that a power to make regulations, "generally regulating the travelling upon or using and working the railway," did not extend to enabling the company to make a by-law that any passenger travelling without a ticket, &c., should be required to pay his fare from the station from whence the train originally started, but that such power must be limited to the ordering of the traffic itself, and the physical using and working of the lines and stations of the company. See also *Bentham v. Hoyle*, L. R. 3 Q. B. D. 289.

The resolution in question, which, if valid, all license holders are bound to obey upon pain^{of} forfeiture or suspension of their license, declares that no intoxicating liquor shall be sold, *under any pretence whatever*,

1. To any person who has the habit of drinking to excess, or,

(a) The wife, husband, child, employee, agent, or member of the family or household of such person; or,

2. To any person concerning whom notice—

(a) Either *verbal* or written has been given to the tavern-keeper, &c., by

(b) The husband, wife, child, guardian, or master of such person; or,

(c) *Any Justice of the Peace or Inspector of the District*, that such person is in the habit of drinking intoxicating liquors to excess.

3. Nor shall any intoxicating liquor be sold

(a) *To any person*,

(b) After a notice in writing forbidding such sale has been served upon the tavern-keeper, &c., by

(c) The husband, wife, or child of any such person; or,

(d) Justice of the Peace or License Inspector.

I am clearly of opinion that this resolution is in all respects *ultra vires* the license commissioners and void, because it attempts to prohibit the sale of liquor to persons to whom a sale is not prohibited by the Act, and to an extent and under circumstances not authorized by the Act.

Mr. Ridout, who argued the case very well, urged that, looking at section 90, the resolution came fairly within the scope and intention of the Act.

It seems to me, however, that a strong argument against its reasonableness and validity is to be found in the terms of that very section. This is deducible from the authorities I have already referred to, and I think the principle is illustrated by cases in which the reasonableness of conditions exacted by Insurance and Rail-

way Companies has been considered. In *Ballagh v. The Royal Insurance Co.*, 5 App. R. at p. 107, Patterson, J. A., said, "It is in my judgment quite out of the question to hold that in the view of this statute, (the Mutual Insurance Companies' Act), any condition can be just and reasonable which, *in any of the particulars dealt with by the statute*, assumes to impose a heavier burden or a more stringent rule than that which would have to be sustained or obeyed under the terms of the statute itself." See also *Butler v. The Standard Ins. Co.*, 4 App. R. at p. 399.

The 90th section is the only one which even remotely bears upon the resolution. It provides that the husband, wife, parent, brother, son, guardian, or employer of any person who has the habit of drinking intoxicating liquors to excess, or the parent, brother, or sister of the husband or wife of such person, or the guardian of any child or children of such person, may give notice *in writing* to any person licensed to sell, &c., not to deliver intoxicating liquors *to the person* having such habit.

The section then goes on to enact that, if the person so notified at any time within twelve months after such notice, by himself, his servant, or agent, otherwise than in the terms of a special requisition for medicinal purposes, signed by a licensed medical practitioner, delivers any such liquor to the person having such habit, the person giving the notice may maintain an action against him as for a personal wrong.

I think the commissioners might well have passed a resolution requiring the license holder to observe the implied prohibition contained in this section, upon pain of forfeiture or suspension of his license; but they have gone much further.

The Act impliedly prohibits a sale of liquor only to the habitual drunkard himself, after a written notice has been given by certain relatives or persons who stand in some legal relation towards him, and who have a direct interest in his sobriety; and even he may procure it for medicinal purposes, upon producing a proper requisition. The reso-

lution makes no such exception, and prohibits a sale on any pretence whatever ; and, under the first clause, not only to the drunkard himself, but to his servant, agent, or any member of his family or household. Under this clause, notice is not even required to be given to the tavern-keeper, who must act upon his own judgment and means of knowledge at his proper peril.

It was contended that the clause would be intended to relate only to a sale knowingly or wilfully made, or to an agent or person for the use of the drunkard ; but, as is said by Sir John B. Robinson, in *Barclay v. Darlington*, already cited, a case which contains much that has a direct bearing upon the principal question, " laws creating offences must be more precisely framed."

The second clause of the resolution permits the notice to be either verbal or written, although the Act expressly requires it, and with good reason, to be in writing.

The Act confers the right of giving the notice only upon private persons, who may be supposed, as I have said, to have an interest in the drunkard, while the resolution makes his conduct and control matter of public concern, by enabling any Justice of the Peace or License Inspector to give the notice ; and the third and last clause places it in the power of certain relatives and officials to forbid the sale of liquor to any person, whether such person is an habitual drunkard or not.

This is not regulation ; it is legislation, more " thorough" and advanced than any which has hitherto been placed on the Statute-book.

I think the demurrer must be allowed.

Judgment for plaintiff on demurreer.

IN RE STAYNER ET AL.

Village—Statute labour.

There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation was held *ultra vires* and void, and was quashed.

McCarthy, Q. C., moved to quash By-law No. 101 of the corporation of the village of Stayner, passed 11th August, 1881, intituled "A by-law to authorize the Commutation of Statute Labour, and to provide for the collection of Poll Tax.

The by-law provided (1) that all persons liable to perform statute labour in the municipality during the year 1881, according to the assessment roll, should commute the same at the rate of 50 cents per day, if paid on or before the 15th July, 1881 (*sic*). If not paid by that day, the commutation should be paid at the rate of \$1.00 per day for such number of days as were set down to their assessment on the assessment roll. (2) That all persons of the full age of twenty-one years, resident in the municipality, not entered on the assessment roll, and not exempt by law from the performance of statute labour, should pay the sum of \$2.00 each on or before the 15th July, 1881.

November 11, 1881. *Lount*, Q. C., shewed cause. He contended that the application was too late: that the operation of the by-law was spent, and that the applicants were estopped from objecting to the present by-law because they had not objected to similar by-laws which had been passed during the years 1879 and 1880. He also urged that the by-law was not bad on its face, and therefore should not be quashed, as it only provided that all persons liable to perform statute labour should pay the commutation, and if there were none such, it could have no operation.

McCarthy, Q. C., contra.

November 15, 1881. OSLER, J.—It is clear there is no liability to perform statute labour in a village municipality, and therefore the council have no authority to pass any by-law to provide for its commutation. The sections of the Municipal and Assessment Acts relating to statute labour are confined to townships alone.

As, therefore, there can be no one liable to perform statute labour in this village, a by-law which provides that all persons liable to perform it shall pay a commutation in lieu thereof is *ultra vires* and void. It is illegal on its face, and ought to be quashed to prevent the council from attempting to act upon it, as it is sworn they have acted upon former similar by-laws, by assessing the lands of the applicants, who are non-residents, for the commutation. I do not understand why the fact of the applicants having submitted to former illegal by-laws of this corporation should estop them from objecting to this one, and the motion is clearly within time. The by-law in question must be quashed, with costs.

Judgment accordingly.

GRANT v. O'HARE (a).

Ejectment—Mortgage—Statute of Limitations

Hugh O'Hare purchased the land in question, and took a deed dated 30th April, 1870. His brother James, the defendant, paid a small portion of the money, and immediately went into possession. Hugh occasionally visited the place. On the 30th November, 1874, Hugh mortgaged to the plaintiff, who issued his writ on 25th February, 1881. Defendant claimed title by possession.

Held, that in any event the statute would not commence to run in defendant's favour until a year from his entry, and that he therefore had acquired no title.

EJECTMENT for the west half of lot six, in the seventh concession of Richmond, the writ being tested on 25th February, 1881.

Plaintiff claimed as mortgagee of Hugh O'Hare, who claimed as grantee of Daniel McHenry, under a deed dated 30th April, 1870.

The case was tried at the last Spring Assizes, at Napanee, before Osler, J.

It appeared that the defendant, James O'Hare, paid \$250 of the purchase money, and Hugh the balance. James then entered into possession and Hugh left for the States, having never since visited the property. James occupied, claiming as owner, paying no rent, nor acknowledging title in any one, besides making substantial improvements, such as an owner only would make. On 30th November, 1874, Hugh mortgaged to the plaintiff without defendant's knowledge, who contended that he acquired title by ten years' possession on 30th April, 1880; while the plaintiff contended that, as mortgagee, he was protected by R. S. O. c. 108, sec. 22, and entitled to bring his action within ten years after the last payment of interest by Hugh.

A verdict was entered for plaintiff.

L. Wallbridge, Q.C., moved for a rule *nisi* to set aside the verdict and enter it for the defendant, on the ground

(a) This case should have appeared among the Easter Term judgments, but was unavoidably delayed.

that defendant never became tenant of his brother, but entered as owner; and also that ten years' possession by defendant gave a good statutory title. He contended that, as against Hugh, defendant had acquired a statutory title, and that though the plaintiff might rely on *Doe d. Palmer v. Eyre*, 17 Q. B. 366, and *Boys v. Wood*, 39 U. C. R. 495, the latter went off on a different principle, and the former was distinguishable, as there there was privity between the defendant, who was tenant, and the mortgagor: that the defendant's title in this case was adverse, and to allow the plaintiff's contention to prevail would defeat the clause barring the right of entry after ten years simply by mortgaging, which was not the intention of the statute.

May 20th, 1881. HAGARTY, C. J.—It seems clear from the evidence that McHenry owned the land: that Hugh O'Hare purchased from him in 1870, and paid nearly all the purchase money, his brother James, the defendant, paying a very small portion of it: that defendant, James, at once entered into possession with the mother, and Hugh occasionally visited the place. In 1874 Hugh mortgaged to the plaintiff. Defendant admits he knew of the mortgage four or five years ago.

We think it clear that the very highest right or claim which could be recognized in defendant under the statute could not commence until the expiration of a year after his entry.

The defence could only succeed by counting defendant's possession from the date of his entry.

We must not be understood as expressing any opinion in favor of his right commencing at the end of a year; but merely as holding that it could not have any earlier commencement.

We refuse the rule.

ARMOUR and CAMERON, JJ., concurred.

Rule refused.

RE GALLERNO AND TOWNSHIP OF ROCHESTER.

By-law—Publication of—Adjoining municipality.

A proposed by-law of the township of Rochester, in the county of Essex relating to drainage, was published in a newspaper in Windsor, a large town, and, for all other than judicial and municipal business, practically the county town, and situate two miles from Sandwich, the county town. There was no newspaper published either in Rochester or in Sandwich, or in the *next* adjoining municipality; but there were papers published in several small villages, somewhat nearer the township of Rochester than Windsor, but their circulation was much smaller in Rochester than that of the Windsor paper.

Held, that the publication was sufficient; since if the words "adjoining local municipality," as used in 42 Vict. cap. 31, sec. 27, were construed "next adjoining &c." it would be impossible to publish the by-law as directed by the Act; and it did not form sufficient ground of objection thereto, that there were other papers a few miles nearer to Rochester than Windsor was.

H. J. Scott obtained a rule *nisi* calling on the township of Rochester to shew cause why By-laws numbers 39 *b* and 41 *b* of the township should not be quashed, on the grounds

1. That the by-law included the sum of \$449.49, illegally added thereto, being the costs of an appeal against the township of West Tilbury, from the assessment of the township of Rochester, which appeal was not authorized by the township of Rochester, but was made and carried on by the Reeve without any authority, and after a resolution of the township to stop the said appeal.

2. That neither of the by-laws was published once or oftener in some newspaper in the municipality of the township of Rochester, or in some newspaper published in the nearest municipality to the said township of Rochester, as required by the Revised Statutes of Ontario, ch. 174.

3. That by-law No. 41 *b* professed to be an amendment and alteration of by-law No. 39 *b*, and the township of Rochester had no power to amend or alter the by-law 39 *b* after the same was passed, or if they had such power they could not exercise it without properly advertising said by-law 41 *b*.

By-law 39 *b* was provisionally adopted by the Council on the 5th of March, 1881, and passed finally by the

Council on the 9th of April, 1881. By-law 41b was passed on the same day.

The facts appeared to be as follow :—

The applicant, who resided in the township of Tilbury West, and was a freeholder in Rochester, stated that in 1880 Tilbury West constructed a drain in that township under the Municipal Act, and it was referred to Augustine McDonell, C. E., to report on and make an estimate and assessment for the construction of the drain. He made his report and estimate, and an assessment on the lands to be benefited, and in pursuance of the Drainage Acts, in order to find an outlet to the proposed drain, he proposed to make the drain through part of Rochester; and he assessed the lands and roads in Rochester for the benefit to be derived from the said drain, the assessment on Rochester being \$1,866.

The Council of Rochester appealed from the assessment, and appointed an arbitrator, and Tilbury West also appointed an arbitrator. Afterwards Rochester, on the 16th of August, by resolution of the Council, withdrew, and rescinded the said resolution as follows :

“ Moved by Mr. Taylor and seconded by Mr. Sylvester, that the appeal against the assessment of A. McDonell on the Alexander Drain be withdrawn, and the clerk notify the reeve of Tilbury West.”

Notwithstanding such resolution, the reeve of Rochester proceeded with the said arbitration, and the said appeal was dismissed with costs, and costs were thus incurred to a sum exceeding \$449.

The appeal and arbitration were contrary to the wishes and interest of every property holder who was assessed in Rochester, as they were all most anxious the drain should be constructed, and were willing to pay the assessment levied therefor, but they were not willing to pay for the costs.

The township presented other and further facts than those which the applicant stated.

The township represented that on the 5th of August,

1880, the Council determined upon an appeal against the assessment, and appointed an arbitrator, and served the reeve of Tilbury with notice of their intention on the following day.

On the 14th of the same month, the resolution was passed, as before stated, withdrawing from the appeal.

On the 9th of September, at a special meeting called by the reeve to lay before the Council the action taken by Tilbury West, in enforcing an arbitration on the Alexander Drain, after the Council had by resolution withdrawn the appeal, it was moved, seconded and carried: "That the reeve be authorized to take the necessary steps to defend Rochester on the arbitration in *Tilbury West v. Rochester*."

The reeve, Patrick Strong, said that after serving the notice of appeal it came to his notice, and to the notice of the other members of the council, that the parties interested in the proposed drain intended to give evidence unfavourable to the appeal; and under the supposition that Rochester could withdraw from the appeal, the resolution of the 14th of August withdrawing from the appeal was passed.

He afterwards learned that Tilbury West claimed a large amount of costs against Rochester, and he laid that matter before the council on the 9th of September, when the council passed the resolution that he should take steps to defend Rochester on the arbitration; and he therefore employed counsel to appear on the arbitration: that he acted in good faith and in accord with all the council of the township; and he believed the appeal of the township would have been successful had not the applicant given evidence that he was satisfied with the assessment, and others interested in the said drain, given similar evidence.

The reeve by another affidavit swore that there was no newspaper published in Rochester nor in any adjoining municipality; and it appeared by the papers on both sides that the by-law 39 b was published in a newspaper published in the town of Windsor.

William Taylor, a councillor of Rochester, confirmed the

affidavit of the reeve, and it appeared the *Windsor Review* had a very good circulation in Rochester, while the *Kingsville Reporter*, he did not believe, had more than two subscribers in Rochester.

Robert Sylvester, another councillor of Rochester, made a like affidavit.

Mr. Ellis swore that there was no newspaper published in Sandwich, the county town of the county, in which Rochester was situate, and that Windsor was two miles distant from Sandwich.

The town clerk also made affidavit on these matters.

January 17, 1881. *Aylesworth* shewed cause, and *H. J. Scott* supported the rule.

June 21, 1881. WILSON, C. J.—The rule states that the by-laws were not published in a newspaper published in Rochester, or in a newspaper published in the nearest municipality to Rochester, as required by the Revised Statutes of Ontario, ch. 174. It refers to a section of the Act which has been repealed—because it is not now necessary to publish in a paper published in the municipality,—“or if no newspaper is published therein, then in some newspaper published in the nearest municipality in which a newspaper is published”; and the applicant has based his complaint upon the fact that the publication in Windsor is not sufficient, because “there was a newspaper published in the village of Essex Centre, in the township of North Colchester, very much nearer Rochester than the town of Windsor, and there are also newspapers published in the village of Kingsville, and in the village of Leamington, in two municipalities much nearer Rochester than the town of Windsor.”

The present law is the enactment of 42 Vic., ch. 31, sec. 27, which takes the place of section 531 of the Municipal Act, and which requires the publication to be made in a newspaper “published either within the municipality *or in the county town*, or in a public newspaper published *in an adjoining local municipality*.”

There is no newspaper published in any of the adjoining (that is *next* adjoining) municipalities to Rochester; and if *adjoining* be used as *next* adjoining municipality, then the by-law could not be published as the Act directs, nor could publication be made in the county town, because, singular as it may appear, there is no newspaper published in Sandwich, the county town of Essex, as Windsor, which is two miles distant, is for all other than municipal and judicial business, practically the county town.

The town of Windsor, if computed from the town hall of Rochester, is very little farther than some of the places named in which a newspaper is published, excepting the village of Essex Centre; and if "adjoining" is not restricted to *next* adjoining, I should not avoid a by-law because it was published at a place a few miles more distant than it might have been, when it was published in a town which is practically the county town, and in a paper there which has a circulation many times greater than either the *Kingsville Reporter* or *Leamington Post*. But besides that the applicant has made his case that the by-laws were not published in the *nearest* municipality in which a newspaper is published, and *that* it is clear it was not necessary for the township to do.

Then as to the objection made to the costs of the arbitration, I am of opinion it has been well answered.

The reeve did act under the express authority of the Council in all he did.

If any other publication should have been made, it has not been properly shewn it was not made, and if it is meant to rely on section 21 of the 42 Vic., ch. 31, not having been complied with, it should have been shewn that no such notices were given to the parties affected as that enactment directs; and I shall not hold the by-law to be invalid because no publication could have been made of them according to the terms of the Act.

Rule discharged, with costs.

GRANT V. MCALPINE.

Verdict—Judgment—Set-off.

The plaintiff had recovered a verdict for \$600 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same Assizes the defendant recovered a verdict against the plaintiff for \$380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the Court held this to be a device to prevent a set-off.

Held, that the defendant was entitled to have the plaintiff's verdict set off *pro tanto* by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff.

In Easter term last (May 27th), *H. Cameron*, Q. C., obtained from the full Court a rule returnable before a single Judge in Court, calling upon the plaintiff to shew cause why the verdict obtained by him herein should not be set off *pro tanto* against the judgment entered upon the verdict obtained by the defendant herein against the now plaintiff at the Lindsay Spring Assizes.

The facts shortly were, that the plaintiff, on the 7th February, 1881, at the Lindsay Spring Assizes, recovered a verdict for \$600 against the defendant in this action for malicious prosecution.

On the same day an action by the now defendant against the now plaintiff was tried at the same Assizes, to recover the amount of certain promissory notes made or endorsed by the now plaintiff. Judgment was reserved; but it was known that the now defendant would recover a verdict for some amount. A verdict was afterwards entered for \$2,180, and on the 25th May judgment was signed thereon.

Judgment had not been signed in this action. The defendant not complaining of the verdict against himself, asked that it might be set off, or that further proceedings thereon might be stayed, upon his acknowledging satisfaction to the amount thereof upon the judgment he had recovered against the plaintiff, who was admittedly insolvent.

The application was resisted on the ground that the verdict had been assigned to one Hugh Grant, a brother of the plaintiff.

An affidavit was made by Hugh Grant, the assignee, to which was annexed the assignment, bearing date the 7th April, 1881, and a promissory note for \$900, made by the plaintiff in favor of and endorsed by the assignee. There was no reason to doubt that this note was endorsed for the plaintiff's accommodation, and was paid by the assignee, who swore that on the 7th April the plaintiff was indebted to him in the sum of \$900, with interest from the 7th February, 1880; and in the further sum of \$100, which bore interest at 8 per cent. from the 7th April last, on which day it was advanced by him to the plaintiff in cash: that the plaintiff recovered the verdict in question, and assigned it on the same day to secure him in part for the debt referred to.

June 28, 1881. *J. K. Kerr*, Q.C., shewed cause. The assignment from the plaintiff Alexander Grant to Hugh Grant was *bonâ fide*. There was a valid consideration of \$900, a debt due to Hugh Grant by plaintiff, which sum was paid by Hugh Grant to this very defendant over a year previously. It was the amount of a note which Hugh Grant had endorsed for the plaintiff, and \$100 in cash was paid down as well when the verdict was assigned. The right to set off judgment is not a legal one, and is an appeal to the equitable jurisdiction of the Court: *Simpson v. Lamb*, 7 E. & B. 84. No suspicion is cast upon the consideration. No attempt has been made to make the money under a *fi. fa.* against the plaintiff on the judgment recovered by the defendant. The only possible ground of attack is under the Statute of Elizabeth, and it is not shewn that Hugh Grant had any knowledge of the circumstances of the plaintiff. Though the verdict was for damages for malicious prosecution, it could be assigned before judgment: *Simpson v. Lamb*, 7 E. & B. 84; *Anderson v. Radcliffe*, E. B. & E. 806. A much stronger case against an assignment was shewn in *Smith v.*

Selwin, 5 W. R. 682; but the Court refused to interfere: *Miller v. Thompson*, 1 P. R. 245. The attorney has an undoubted lien for costs as between attorney and client: *Bletcher v. Burn*, 25 U. R. 92; *Archbold's Practice*, 13th ed., 145; *Middleton v. Hill*, 1 M. & S. 238; *Watson v. Maskell*, 1 Bing. N. C. 727.

McCarthy, Q.C., contra. The assignment was not *bona fide*, as the affidavits and depositions shew. It was made immediately after the verdict was obtained, and while the counter action by the defendant against the plaintiff was pending; and it was evidently made to defeat the expected judgment to be obtained by the defendant against the plaintiff for \$2,000. *Orr v. Spooner*, 10 U. C. R. 601, is a direct authority against the validity of the assignment.

June 30, 1881. OSLER, J.—A careful perusal of the affidavits, and of the examination of the plaintiff and Hugh Grant, leaves no doubt on my mind that the alleged assignment was not made in good faith, but for the purpose of preventing a set-off against the verdict, which was about to be obtained against the plaintiff by the now defendant.

The attendant circumstances of time and place under which it was given would strongly point to this conclusion; so strongly that I should hardly have been justified in accepting the plaintiff's statement to the contrary, even if it had been consistent with that of the assignee, who, however, on being asked whether the verdict was not got into his hands to prevent it being got hold of by McAlpine, only answers that he got it to save himself. In his affidavit he says that the plaintiff was indebted to him, in addition to the \$800 not disputed, in the further sum of \$100 advanced in cash on the day when the assignment was taken, which bears interest at eight per cent., the assignment being taken as security in part for both debts. But in his examination he does not treat the \$100 as a loan. He swears that he gave that sum for the verdict, buying it out and out, and was to run all chances of its being set aside or reduced, and so far from the assignment being taken as

security only for the two sums, he says that, even if he never succeeded in recovering the verdict, the amount was to be credited upon the plaintiff's debt.

The plaintiff's story is, that he insisted upon receiving \$100 out of the verdict, understanding that if McAlpine did not pay he was to pay it back.

There are other inconsistencies and improbabilities in the evidence of both these persons, which prevent me from placing any reliance upon it.

I think it is extremely doubtful whether notice of the assignment was given to the defendant, if that can be important under the circumstances. The defendant denies it; the assignee says he did not give it; the only person who speaks of it is Mr. McIntyre, who drew the assignment; and all that he can say about it is that shortly after its execution he had a conversation with the defendant, in which, "to the best of his knowledge and belief," he informed the defendant of the fact.

I have looked at all the cases cited for the assignee, and they are clearly distinguishable. If the *bona fides* of the assignment had been established, it might have been argued upon the authority of *Simpson v. Lamb*, 7 E. & B. 84, and *Anderson v. Radcliffe*, E. B. & E. 806, that it was not invalid merely because it was an assignment of a verdict in an action for a tort. But, however that may be, the case of *Orr v. Spooner*, 19 U. C. R. 601, cited by Mr. McCarthy, appears to be on all fours with the present case, and is an authority which I should be bound to follow, even if it did not commend itself to me as laying down a very reasonable rule.

In that case the plaintiff had a verdict in an action for malicious prosecution, against which the defendant proposed to set off a judgment which he had recovered against the plaintiff. It was contended that there could be no set off, because judgment had not been entered, and also because the verdict had been assigned. The Court (Sir John B. Robinson, C. J.,) held that it was no objection to the application that that judgment had not been entered.

As to the assignment, it was said: "The defendant's application is, however, further resisted on this other ground, — that the plaintiff has assigned his verdict against the defendant, and all the demand he can establish under it, in satisfaction of a debt of his to one Reid. We do not think the alleged assignment ought to be allowed to defeat this application. The verdict was rendered on the 10th of May, and the plaintiff swears that he assigned it by a deed *bearing date* the 14th of May, which deed he produces. There is much reason to believe, from the affidavits, that the assignment is merely a contrivance to defeat any such application; but that is denied by the plaintiff upon oath, and by Reid; and whatever might be our impressions, we could not assume the defendant's belief of that fact to be well founded, and act upon his affidavit as a proof of it. Still it remains to be considered whether we ought to recognize any interest in Reid under the assignment of the verdict made in the short interval between the trial and the term, against which verdict moreover the defendant had leave reserved to him to move. Our opinion is, that we should not suffer it to stand in the way of so just an arrangement as is desired on the part of the plaintiff."

In the present case there was no leave reserved, as in *Orr v. Spooner*; but the judgment of the Court does not turn upon that fact; it is referred to merely as an additional circumstance in the defendant's favour.

Following that case, I think the present rule should be made absolute, that on the defendant entering satisfaction to the extent of \$600 upon the judgment which he has obtained against the plaintiff, and upon payment of the costs of suit, further proceedings herein shall be stayed.

I do not direct the costs to be paid as between solicitor and client, because the plaintiff's attorney has made an affidavit in support of the assignment, thereby disclaiming, as it appears to me, any lien on the verdict.

As to the costs of this application, I make no order.

Judgment accordingly.

IN THE HIGH COURT OF JUSTICE.
QUEEN'S BENCH DIVISION.

MICHAELMAS SITTINGS, 45 VICTORIA, 1881.

(From November 21 to December 10.)

Present :

HON. JOHN HAWKINS HAGARTY, C. J., *President.*

“ JOHN DOUGLAS ARMOUR, J.

“ MATTHEW CROOKS CAMERON, J.

WILLSON V. YORK (*a*).

Award—Arbitrator or umpire—Tenure of municipal officers—Dismissal.

Municipal officers appointed by the council hold office during the pleasure of the council, and may be removed without notice and without cause. To an action for wrongful dismissal, and on the common counts, defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., and such third person as “the said arbitrators” should appoint, “so that the said arbitrators or umpire,” make his or their award * * by, &c., or such further day as “the arbitrators, or any two of them,” might enlarge to. Before entering upon their duties, S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, but professed, in the body of it, to be the award of the three. *Held*, that E. was a third arbitrator, not an umpire; that the word “umpire,” in the submission, must be rejected as surplusage; and the award was invalid, not having been made by all three arbitrators.

DECLARATION :

First count, alleging a yearly hiring for a year from January 1, 1880, at \$1,500 a year, payable quarterly; an enter-

(*a*) The judgment in this case was delivered in Easter Term last, but was not handed to the Reporter until the present Sittings.

ing upon the service, and a wrongful dismissal therefrom; Second count, alleging a hiring at the rate of \$1,500 a year, determinable upon a reasonable notice by either party; an entering upon the service, and a dismissal therefrom without such notice. Third and subsequent counts, for work done by the plaintiff as clerk and treasurer of and for the defendants, and for work done by the plaintiff as division registrar and sub-treasurer of and for the defendants; and for work done, for money lent, for money paid, for money had and received, for interest, and upon accounts stated.

Pleas—1. To first count, did not promise. To second count, did not promise. 3. To second count, did determine by reasonable notice. 4. To third and subsequent counts, never indebted. 5. To third and subsequent counts, payment. 6. To third and subsequent counts, set-off for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money had and received, interest, and upon account stated. 7. To whole declaration, a reference to and award by James Speight, Wilburn D. Norris, and George Eakins. 8. That defendants, in pursuance of their powers as a municipal corporation, discharged the plaintiff from any further employment by them, and gave the plaintiff notice of the same, and the plaintiff, in pursuance of the said notice, ceased to act as such clerk and treasurer, and surrendered and gave up all the books and papers which he, as such clerk and treasurer, held, and has not since been required to act, and has not acted in said capacity of clerk and treasurer.

Replication—1. To 1st, 2nd, 3rd, 4th, 5th, 7th, and 8th pleas, joinder; 2. To 6th and 7th pleas, never indebted; 3. To 7th plea, that James Speight, Wilburn D. Norris, and George Eakins did not make any such award of and concerning the matters referred to them, as alleged.

Issue.

The cause was tried at the last Fall Assizes, at Toronto, by Morrison, J. A., without a jury, when the following facts appeared:—

The plaintiff was appointed clerk and treasurer of the

defendant corporation by by-law, passed August 6th, 1866, and continued to be such clerk and treasurer until the passing of the by-laws hereinafter next mentioned.

At the first meeting of the council of the defendants' corporation elected for the year 1880, which was held on the 19th of January of that year, a by-law was passed providing that all by-laws and resolutions appointing the plaintiff to the offices of clerk and treasurer should be repealed so far as they related to his appointment; and, at the next meeting of the council, which was held on the 26th of January, 1880, a by-law was passed appointing one Lesslie to be the clerk, and one Jacques to be the treasurer of the defendant corporation. On the 23rd day of December, 1879, the following agreement under seal was entered into between the defendant corporation and the plaintiff: "Memorandum of agreement made this 23rd of December, 1879, between the Corporation of the Township of York, and Arthur Lawrence Willson, of the said Township of York, clerk and treasurer of said corporation: Whereas certain disputes and difference have arisen between the Municipal Council of the Corporation of the Township of York and Arthur L. Willson, clerk and treasurer of said municipality, and it is desirable to refer the said matters in difference and all questions of account between the said parties to arbitration, as hereinafter mentioned, as to the amount payable by the said corporation to the said Arthur L. Willson in respect of services rendered by him as clerk and treasurer, and otherwise, and for expenses incurred by him in respect of his duties and in the performance of the services aforesaid as to the accounts between the said municipality and the said Arthur L. Willson, and as to the salary due and payable to him as such clerk and treasurer, and as to the alleged agreement between them respecting the same, and as to what moneys, if any, the said Arthur L. Willson is entitled to receive over and above his salary from the said municipality, and as to whether the said Arthur L. Willson has, as such treasurer, duly and properly accounted for all moneys received by him as such treasurer, and

whether any moneys are due from the said municipality to the said Arthur L. Willson, or from the said Arthur L. Willson to the said municipality, and if any are due either way, then what amount. Now, it is hereby agreed by and between the said Corporation of the Township of York (hereinafter called the corporation) and the said Arthur L. Willson to refer, and the said Corporation and the said Arthur L. Willson do hereby refer, all matters in difference between them to the award, order, arbitrament, final end and determination of James Speight, of the village of Markham, in the County of York, Esquire, and Wilburn D. Norris, of the village of Yorkville, in the County of York, merchant, arbitrators nominated by the said corporation and the said Arthur L. Willson respectively, and such third person as the said arbitrators shall, by writing under their hands endorsed on these presents, nominate and appoint, so that the said arbitrators or umpire make and publish his or their award of and concerning the same ready to be delivered to the said corporation or the said Arthur L. Willson, their successors or personal representative, signing the same on or before the fifteenth day of January next after the date hereof, or such further day as the said arbitrators, or any two of them, may from time to time enlarge the time for making said award by writing under their hands endorsed on this agreement.

“And it is hereby further agreed that the said arbitrators may, by their award, order and determine what they shall think fit to be done by the said parties hereto, respectively, concerning said matters of difference, and that the costs of this reference and of the award to be made shall be in the discretion of the said arbitrators, who may award by whom, to whom, and in what manner the same shall be paid. And the said corporation and Arthur L. Willson, hereby agree with the other to stand to, abide by, obey, perform, fulfil, and keep the said award so be made and published as aforesaid. And it is further agreed that it shall be in the discretion of the said arbitrators to examine the parties, either or both of them, and that the witnesses

on the reference and the parties, if examined, shall be examined on oath, and that the said parties, respectively, shall produce before the said arbitrators all such books, deeds, papers, documents, and writings in his or their custody, power, or control, relating to the matters referred as the said arbitrators shall think fit to require, and that the said parties respectively shall do all the acts necessary to enable said arbitrators to make their award herein, and that neither of them shall wilfully and wrongfully do or cause to be done any act to delay or prevent the arbitrators from making their award.

“And it is further agreed that the said arbitrators may proceed in the said reference *ex parte*, if either of the said parties refuse or neglect to attend before them after having received due notice and without reasonable excuse. And each of the said parties hereto agrees with the other, that they will not bring or pursue any action or suit in any court of law or equity against the said arbitrators for or in respect of the matters in pursuance of this agreement. And it is hereby further agreed that this agreement shall be made a rule of Her Majesty’s Court of Queen’s Bench ; and further, that in the event of either of the said parties disputing the validity of the said award, or moving the said Court of Queen’s Bench or any other Court to set the same or any part thereof aside, or in any other event, the said Court shall have power at any time, and from time to time, to remit the matters hereby referred, or any or either of them, to the reconsideration and redetermination of the said arbitrators, and with, upon, and subject to such directions, powers, and terms as to the said Court may seem proper. And it is further agreed that the parties may offer evidence behind the certificates for payment of the revision of the voters’ lists, granted by his Honour the Junior Judge of the County of York, as to the value of the services charged for in respect of the said voters’ lists, and notwithstanding such certificates the arbitrators may ascertain the amount, if any, that should be paid to the said Arthur L. Willson for the services mentioned in the said certificates, and may

make their award respecting the same binding on both parties, as if no such certificates had ever been given."

The following endorsements were made upon the said agreement: "We, the within James Speight and Wilburn D. Norris, do by this memorandum under our hands, made before entering or proceeding on the within mentioned arbitration, nominate and appoint George Eakins, of the City of Toronto, the third person or arbitrator to whom, together with ourselves, all matters in difference within mentioned between the said parties within named shall be referred according to the within agreement.

Witness our hands this 23rd day of December, 1879,

(Signed) JAMES SPEIGHT,

(Signed) WILBURN D. NORRIS."

"I do hereby agree to act as the third arbitrator in the matter herein.

(Signed) GEO. EAKIN.

Court House, Toronto, Dec. 23rd, 1879."

"Toronto, January, 15th, 1880.

"We, the arbitrators herein, hereby enlarge the time for making our award in the matter herein submitted until the first day of March next, A.D. 1880.

JAMES SPEIGHT,

WILBURN D. NORRIS,

GEO. EAKIN,

Arbitrators."

Toronto, February 20th, 1880.

"We, the arbitrators herein, hereby further enlarge the time for making our award in the matter herein submitted until the first day of April next, A.D. 1880.

JAMES SPEIGHT,

W. D. NORRIS,

GEO. EAKIN,

Arbitrators."

On the 20th day of March, A.D. 1880, James Speight and George Eakin signed, sealed, and delivered the follow-

ing supposed award, but Wilburn D. Norris did not execute it, although it was apparently drawn under the impression that he would execute it :—

“To all to whom these presents shall come, we, James Speight, of the Village of Markham, manufacturer, Wilburn D. Norris, of Eglington and of Toronto, merchant, and George Eakin, of Toronto, Clerk of the County of York, send greeting :

“Whereas, (reciting the above agreement and endorsements thereon),

“Now, know ye that we, the said arbitrators, James Speight, Wilburn D. Norris, and George Eakin, having taken upon ourselves the burthen of the said arbitration, and having heard and duly considered all the allegations and evidence of the said respective parties of and concerning the accounts, claims, and matters in difference, and so referred as aforesaid, do make and publish this our award in writing, of and concerning the said matters so referred to us ; and do hereby award that the said the Corporation of the Township of York was, at the date of the said submission, and still is indebted to the said Arthur L. Willson in the sum of one thousand four hundred and ninety-two dollars (\$1,492) ; and we do award, order, and direct that the said the Corporation of the Township of York, do forthwith allow to the said Arthur L. Willson, his executors or administrators, the said sum of one thousand four hundred and ninety-two dollars, in full satisfaction of all claims of whatever kind so referred to us, and in settlement of all accounts, claims, differences, or matters in dispute between the said corporation and the said Willson. And we further find that the said Willson has in his hands monies of the township of York to the sum of \$1,593.19, and deducting the said sum of \$1,492 allowed to said Willson, we find that the said Willson owes to the said township of York the sum of \$101.19 ; and we therefore award, order, and direct that the said Arthur L. Willson do forthwith pay to the said Corporation of the Township of York, the said sum of \$101.19, and that the claims of

the said corporation against Arthur L. Willson are settled in this our award; and that the said Willson has no further or other claims against the said Corporation of the Township of York. And we do further award that each party do pay their own costs of proceedings before us, and up to this our award, and that neither party to this submission has any claim for such costs against the other. And we do further award that the said Corporation of the Township of York do pay one half of the arbitrators' fees, and of the costs of this our award; and that the said Arthur L. Willson do pay the other half, and that if the said corporation do pay the whole to take up our award, that the said half shall be added to the said amount awarded to be paid by the said Willson; and that if the said Willson pay the whole amount to take up our award, then the said sum of \$101.19, shall be deducted from the half paid by the said Willson on behalf of the said corporation, and the balance only shall be paid by the said corporation to the said Willson. And we do name our fees as arbitrators, and of this our award, at the sum of five hundred and ninety dollars, to be paid as aforesaid."

The particulars of the plaintiff's claim in this action shewed claims which had accrued before the reference, but which the plaintiff alleged had not been brought before the arbitrators, also claims which had accrued after the reference.

The following was the decision of the learned Judge who tried this cause: "In this case, as to the first and second counts for a wrongful dismissal, I think the plaintiff cannot recover, and I shall enter a nonsuit on these counts. As to the common counts, I find the plaintiff entitled to the \$70 allowed by the defendants on the 19th of April, 1880. I allow him also \$9 for attendances in the city, \$4 for registration fees for births, &c., and \$50 for distributing the county assessment for schools for the year 1880. These amount altogether to \$133. On the part of the defendants there is a set-off. I allow them the amount of the award, \$101.19, without determining the question of the validity

of the award. As to the costs of the award, I am not very clear whether they should be allowed as a set-off; it is, I think, clearly an amount which the defendants can recover, and I shall for the present allow it. In that case, the plaintiff being entitled, according to my view of his case, to \$133 on the common counts, and as a set-off the defendants are entitled to the amount of the award, \$101.19, and \$295, the half of the costs of the award, in all \$396.19, deducting the \$133 allowed under the common counts, a balance is left of \$263.19; and I enter a verdict for that amount on the defendants' plea of set-off. The plaintiff has leave to move to reduce the amount of verdict by the amount of costs, or to enter a verdict for him for the difference of \$31.81, that is, the difference between \$101.19 and \$133, or such other amount as the Court may direct. I was anxious to assess the damages contingent on the first and second counts, but there was so strong a divergence of opinion between the learned counsel as to the mode of determining such damages, if any, that I was unable satisfactorily to do so.

"It is strongly contended that the \$1,500 a year mentioned in the by-laws 492 of 1876, and 509 of 1877, did not include remuneration for all the services that the plaintiff, as clerk and treasurer, should perform. I find, however, that that sum did include any service which he performed. I therefore enter a verdict for the defendants as above, on the common counts; and I enter a nonsuit on the first and second counts."

November 25, 1880, *J. K. Kerr*, Q. C., obtained a rule *nisi* calling upon the defendants to show cause why the nonsuit entered on the first and second counts, and the verdict entered for the defendants on the common counts, should not be set aside, and a verdict entered for the plaintiff for such sums as the Court might determine the plaintiff was entitled to recover, pursuant to the Common Law Procedure Act.

February 11th, 1881, *McMichael*, Q. C., shewed cause.

Hickey v. Corporation of Renfrew, 20 C. P. 429, declares that the incoming council may dismiss. The plaintiff claimed certain items of work and labour which were discriminated and allowed; but defendants pleaded a set-off, a certain amount on the award. By the terms of the reference Eakin was constituted an umpire, and when he signed the award it was sufficient. The mere fact that one of the arbitrators signed with him did not invalidate his signature as umpire. He cited *Soulsby v. Hodgson*, 3 Burr. 1474, S. C. 1 W. Bl. 463; *Bates v. Cooke*, 9 B. & C. 407; *White v. Sharpe*, 12 M. & W. 712.

J K Kerr, Q. C., contra. Defendants are not entitled to the amount of costs awarded as the arbitration fees. The award is bad for awarding the arbitration fees; *McCulloch v. White*, 33 U. C. R. 331; Russell on Awards, 5th Ed. p. 373. The umpire had no power to award such fees under the submission, and only the arbitrators could award costs, and they have not done so if the umpire is not to be considered an arbitrator, as distinguished from an umpire. The arbitrators' fees are not costs of the reference and award, which were the subject of reference in this case. There was no power to award half of such fees to be paid under the reference. The plaintiff, having entered upon his employment as clerk and treasurer for the year 1880, and having acted until the second meeting of the council, the council could not dismiss him without compensating him or allowing him salary for the year on which he had entered. *Hickey v. Corporation of Renfrew*, 20 C. P. 429; *Broughton v. The Corporation of Brantford*, 19 C. P. 434, support this view. The council, having admitted plaintiff's right to remuneration for the twenty-seven days of January, recognized his position as having entered on the employment for the year; at all events, he is entitled to receive \$112 for services for the period prior to his dismissal.

May 17, 1881, ARMOUR, J.—The plaintiff was, I think, rightly nonsuited upon the first and second counts of the declaration.

The Municipal Act expressly provides that "all officers appointed by the council shall hold office until removed by the council."

The effect of this is, that all such officers hold their offices during the pleasure of the council, and may be removed by the council at any time without any notice of such intended removal, and without any cause being shewn for such removal, and without the council thereby incurring any liability to such officers for such removal.

There is no hardship in this, for such officers accept their offices upon these terms; and were it otherwise, councils might be greatly embarrassed in the transaction of their public duties by the frowardness of an officer whom they would have no means of immediately removing without subjecting themselves to the liability of an action.

This case cannot be distinguished in principle from that of *Hickey v. The Corporation of Renfrew*, 20 C. P. 429, which we follow and approve of.

The verdict entered by the learned Judge for the defendants upon the issues joined upon the common counts, depends, firstly, upon the question, is the award a valid one? and secondly, if valid, can one half of the arbitrators' fees be set off against the plaintiff's claim?

It was contended before us that the reference constituted Eakin an umpire, and that the signing of the award by Speight was mere surplusage, and that the award must be treated as the umpirage of Eakin; and *Soulsby v. Hodgson*, 3 Burr. 1474, *S. C.* 1 W. Bl. 463, and *Bates v. Cooke*, 9 B. & C. 407, were relied upon in support of this contention.

Soulsby v. Hodgson, was an action of debt upon an arbitration bond; the arbitrators were to choose an umpire in case they should not agree within a limited time; they did not so agree, and chose an umpire who made an umpirage, and they joined in it. The Court held this to be the umpirage of the umpire only; that the joining of the arbitrators was surplusage, and did not vitiate the act of the umpire.

Bates v. Cooke was debt upon an award. The first count of the declaration stated an agreement to refer certain differences to two persons, one to be chosen by each, and in case they should disagree that they should appoint an umpire. It then stated that the plaintiff appointed A., and the defendant B.; that they not agreeing, appointed C. as umpire, and that afterwards A. B. & C. awarded a certain sum to the plaintiff. To this *nil debet* was pleaded. It appeared in evidence on the trial that the arbitrators appointed the umpire before they entered upon the reference, and before they disagreed. The award was produced, which, after reciting that A. and B. had been appointed arbitrators, and that they had appointed C. umpire, proceeded thus: "We, the said arbitrators, award to the plaintiff, &c. As witness our hands, A., B., C." For the defendant, it was contended, (1) that the umpire was improperly appointed, the arbitrators having no power of appointment until they had investigated the matters and found they could not agree; (2), that the award appeared to be made by the arbitrators originally appointed, and that the umpire alone had power to make it; (3), that if it was to be taken as the award of the umpire, it was misdescribed in the declaration. These objections were overruled, and the plaintiff had a verdict. Bayley, J., for the Court, in refusing a rule *nisi*, said: "The declaration states that the submission was to two persons, with power to appoint an umpire if they differed in opinion; and it appeared that they appointed an umpire in the first instance. That, however, is a very fair mode of making the appointment, in case it should be necessary to have his interference, and I do not think that any legal objection can be made to it. Then it is said that the declaration states the award to have been made by the three, but the context in the declaration shows it to have been in legal operation the award of the umpire only, and therefore it does in substance describe it as the award of the umpire; and *Soulsby v. Hodgson* is an express authority that the award is not bad on account of the arbitrators having joined in making it.

Another objection was, that the language of the award was that of the arbitrators and not of the umpire ; but he by signing it adopted that language as his own, and the award in legal operation became his."

If under the reference above set out Eakin was authorized to make an award alone, as an umpire, the award above set out, and pleaded by way of set-off, would not, under the authorities above referred to, be invalid by reason of its being drawn up for Speight, Norris, and him to sign, nor by reason of Speight signing it along with him. See *White v. Sharp*, 12 M. & W. 712. But I do not think he was so authorized, for I think that upon the true construction of the agreement to refer he was a third arbitrator, and not an umpire.

By the agreement the parties referred all matters in difference between them to the award of Speight and Norris and such third person as they should appoint, thus appointing and providing for the appointment of three arbitrators, to whose joint award they submitted their differences. The agreement then provides "so that the said arbitrators or umpire make his or their award," &c. An umpire is a person appointed to make an award in case of the disagreement of the arbitrators, but the agreement does not provide for the appointment of such a person, and there is therefore no person to whom the word umpire in this provision can apply, and this is the more manifest when we find that in this same provision the arbitrators or any two of them may enlarge the time, shewing clearly that the parties were treating the three persons whose appointment they had made and provided for as three arbitrators

The word umpire nowhere else appears throughout the agreement ; and I think that, looking at the whole agreement, we must reject the word umpire as insensible, and hold that an award made under the agreement, in order to be valid, must be made by all three arbitrators.

This being so, we must grant a new trial upon the issues joined upon the common counts. The rule will therefore be absolute for a new trial upon those issues.

I refer to *Hetherington v. Robinson*, 4 M. & W. 608 ; *Peterson v. Ayre*, 14 C. B. 665 ; *Re Eldon v. Ferguson*, 6 U. C. L. J. 207 ; *Winteringham v. Robertson*, 27 L. J. N. S. Ex. 301 ; *Re Marsh*, 16 L. J. Q. B. 330.

HAGARTY, C. J., and CAMERON, J., concurred.

Rule accordingly.

FRASER V. MCLEAN.

Contract—Fraud—Rescission.

The plaintiff in 1873, sold to defendant certain timber limits and chattel property for \$85,000, payable in eight yearly instalments, with many special terms as to advances to be made by plaintiff to defendant to assist him in getting out lumber thereon, commission to be paid by defendant to plaintiff, &c. By deed in 1878, reciting that defendant had been unable to carry out this agreement, it was agreed that in consideration of defendant being released from all obligations to defendant, except as set out in a deed of composition of the same date, the said agreement should be cancelled.

By the composition deed, between the plaintiff and his creditors, to which defendant was a party, the creditors agreed to accept 25 cts. in the \$1, on their respective claims, which was to be paid in part out of the proceeds of a raft belonging to defendant, then on its way to Quebec, and the balance in three years ; and certain lands were assigned as security. To enable defendant to transport his said timber to market, the plaintiff agreed to advance the necessary funds, for which he was to have a preferential claim on the proceeds. The unpaid balance due by one J., under an agreement made by the plaintiff, was to be deducted from the full and not from the reduced amount due to the plaintiff ; and in fixing the amount due to the plaintiff, \$30,000 was to be deducted for the retrocession of the limits, which the plaintiff had agreed to sell to defendant by the cancelled agreement.

It appeared that the defendant in 1878, representing himself to be unable to meet his engagements, and to be largely indebted to one E., among others, and owing the plaintiff about \$80,000, had called a meeting of his creditors, the result of which was the composition deed mentioned and the agreement of the same date with the plaintiff.

The plaintiff had taken possession of the property so taken back by him, and had received the advances made by him to enable defendant to get down the raft, and part of the money due by J. He had never offered back to defendant such property or money, nor offered to release the security, and E., with defendant's other creditors, had been paid in

full. Having discovered that there was no debt due by the plaintiff to E., the plaintiff sued on his agreement of 1873.

Held, (ARMOUR, J., dissenting,) that the whole transaction evidenced by the two deeds in 1878, must be regarded as one arrangement: that the plaintiff could not be treated as a creditor who had received part of his claim, and been induced by fraud to release the residue: that he could not repudiate the release for fraud, not being in a position or having offered to repudiate the whole arrangement; and that his proper remedy was an action for the damages caused by defendant's deceit.

Per ARMOUR, J.—The composition having been obtained by fraud, the plaintiff was entitled to sue for the balance of his debt, crediting the agreed price of the property and money received to the defendant.

DECLARATION on the common counts for goods bargained and sold, goods sold and delivered, work done, money lent, money paid, money received, interest, for work, journeys, and attendances of the plaintiff, by him done, performed, and bestowed, as the agent of and for the defendant, and otherwise for the defendant at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof; for certain timber limits and licenses to cut timber bargained and sold by the plaintiff to the defendant at his request, for certain timber limits and licenses to cut timber, bargained, sold, and assigned by the plaintiff to the defendant at his request; and for money found to be due from the defendant to the plaintiff, on accounts stated between them.

Second count.—And also for that by deed, bearing date the 25th day of July, 1873, and made between the plaintiff of the one part and the defendant of the other part, after reciting, as is therein recited, the said plaintiff and defendant did thereby respectively agree and covenant with each other, that the said plaintiff should sell to the defendant, and that the said defendant should purchase certain timber berths or limits in the said deed described, together with all the farms and other improvements in the said timber limits or berths; and also certain horses, raft and shanty rigging, and other lumbering effects in the said deed described, at the price of \$85,000, to be paid by the said defendant to the said plaintiff, in eight equal annual instalments of \$10,625 each, with interest at the rate of seven per cent. per annum on

the whole purchase money remaining unpaid and payable, with each of the said instalments ; the first instalment of interest to be computed from the 10th day of October, 1872, and subsequent instalments of interest to be computed from the time of payment of the then last preceding instalment of interest, and one of the said instalments of purchase money and interest to be payable in each year on the sale by the defendant of the timber manufactured by him on the said timber berths or limits in the then last preceding lumbering year or season, and in any event not later than the 1st day of December in each year ; the first of such instalments of purchase money and interest to become due and be paid on the sale by defendant of the square timber then already manufactured by him as aforesaid, and in any event not later than the 1st day of December next after the date of the said deed, and another of such instalments of purchase money and interest on the sale by the defendant in each year thereafter of the square timber manufactured by him as aforesaid in the then last preceding lumbering year or season, and in any event not later than the 1st day of December in each year thereafter, until the whole of the said purchase money and interest should have become due and payable ; and that the said defendant should, on the sale by him of the square timber then already manufactured by him on the said timber berths or limits, or any of them, and in any event on or before the 1st day of December next after the date of the said deed, pay to the plaintiff a commission of five per cent. on the gross value, in the city of Quebec, of all the square and waney white and red pine timber so then already manufactured as aforesaid ; and also should and would in each year thereafter, for the term of seven years thereafter, on the sale by the defendant of the square and waney timber manufactured by him in the preceding lumbering season, and in any event on or before each first day of December during the said term of seven years, pay to the plaintiff a commission of five per cent. on the gross value, in the city of Quebec, of all the square and waney white and red pine

timber manufactured by the defendant on the said timber berths or limits, or any of them, in such preceding year. And that the defendant should also on the first day of December next after the date of the said deed, pay to the plaintiff a commission of five per cent. on the gross value, at the mouths of the Black and Coulonge rivers, of all the saw logs and boom timber then already manufactured on or taken from the said timber berths or limits, or any of them ; and should also on each 1st day of December, for the term of seven years thereafter, pay to the plaintiff a commission of five per cent. on the gross value at the mouths of the Black and Coulonge rivers of all the saw logs and boom timber manufactured by the defendant during the then last preceding lumbering seasons on the said timber berths or limits, or any of them ; and that the defendant should in each and every year after the said 1st day of September next after the date of the said deed, for the term of seven years thereafter, get out and manufacture on the said timber berths or limits, or some of them, at least one hundred and twenty thousand square feet of red or white pine timber, and not more in any one year than two hundred thousand square feet of red or white pine timber, and should also in each and every year after the said 1st day of September, for the like term of seven years thereafter, get out and manufacture on the said timber berths or limits at least ten thousand pine saw logs, and not more in any one year than twenty-five thousand pine saw logs ; and that the said plaintiff should, from time to time thereafter, until the expiration of the said term of seven years, make advances to the said defendant to the amount of \$40,000 per annum to assist him in manufacturing and getting out the said timber and saw logs, such advances to be made by the said plaintiff accepting the drafts of the said defendant when drawn on him, the plaintiff, through some chartered bank ; such acceptances to be treated, accepted, and received as cash to the amount of the drafts so accepted ; and such drafts to be renewed from time to time by the defendant until the sale of the said

square timber, and then to be paid and retired by the defendant; and in addition to keeping the said drafts so renewed as aforesaid, the said defendant was to bear and pay the expense of the stamps on said drafts and renewals, and all bank and other expenses connected therewith. And it was by the said deed expressly agreed that the said plaintiff should not be obliged to make advances as aforesaid to the said defendant for any year, while acceptances of the said plaintiff for the said defendant for any previous year were outstanding; and that at no time should the defendant be entitled to draw on the said plaintiff as aforesaid, while acceptances by him for the said defendant as aforesaid, to the amount in the aggregate of \$40,000 were outstanding and unretired; and that the said timber berths or limits, farms and other improvements, should stand as and be a security to the plaintiff as well for the said purchase money and interest, as for the said annual commission, and the said advances, and every of them; but upon payment in full of the said purchase money and interest in manner aforesaid, and the said annual commissions in manner aforesaid, and the said advances in full, and all ground rents or government charges which the said plaintiff might have paid or become liable to pay to keep or have the said licenses or any of them renewed or in force, with interest thereon from the time of such payment or payments thereof, at the rate of seven per cent. per annum, the said defendant should be entitled to an assignment or transfer of the said timber berths or limits from the said plaintiff, upon tendering him a proper assignment or transfer thereof for execution. And that if the said defendant should make default in payment of any of the said instalments of purchase money and interest, or either of them, or any part of them, or either of them, or in payment of the said commissions or either of them, as the said instalments and commissions respectively should become due, then, and in any such case, the whole of the said purchase money remaining unpaid, with the interest then accrued, and the said commissions in default, should all forthwith, at the

option of the said plaintiff, become due and payable in like manner, and with the like consequences and effects to all intents and purposes whatsoever, as if the time therein mentioned for the payment of the whole of such purchase money and interest had fully come and expired. Yet the defendant did not pay to the plaintiff the fourth instalment of the said purchase money of \$85,000, which, by the terms of his covenant in that behalf, became due and was payable to the plaintiff in the year 1876, or any part thereof; nor the interest thereon, nor any part thereof; nor the interest on the whole purchase money remaining, nor any part thereof; and the defendant did not pay to the plaintiff the fifth instalment of the said purchase money of \$85,000, which, by the terms of his covenant in that behalf, became due and payable to the plaintiff in the year 1877, or any part thereof; nor the interest thereon, nor any part thereof; nor the interest on the whole purchase money remaining unpaid, nor any part thereof; by reason of which said default the sixth, seventh, and eighth instalments of the said purchase money of \$85,000, with the interest thereon as aforesaid, became due and payable to the plaintiff; but the defendant did not pay the same, or any part thereof.

Averment.—That the defendant manufactured on the said timber berths or limits during the lumbering seasons of the years 1875, 1876, 1877, and 1878, a large quantity of square and waney white and red pine timber, amounting to the gross value, in the city of Quebec, to wit, of the sum of \$69,000, and sold the same, to wit, before the commencement of this suit; yet the defendant did not pay to the plaintiff the commission of five per cent. on the gross value of the said timber, or any part thereof.

Averment.—That the defendant manufactured on the said timber berths or limits, during the lumbering seasons of the years 1875, 1876, 1877, and 1878, a large quantity of saw logs and boom timber, amounting to the gross value, at the mouths of the Black and Coulonge Rivers, of the sum of, to wit, \$22,500; yet the defendant did not pay to the plaintiff the commission of five per cent., on the gross value of the said

saw logs and boom timber, or any part thereof. Averment.—that, in pursuance of his said covenant in that behalf, he did, on divers days and times between the 1st day of October, 1875, and the commencement of this suit, accept divers drafts of the defendant on him (the plaintiff) for divers large sums of money, amounting, in the aggregate to wit, to the sum of \$65,000; and although the said defendant sold his said timber before the commencement of this suit, yet the defendant did not pay or retire the said drafts, or any of them, nor the stamps thereon, nor the bank or other expenses connected therewith, contrary to his covenant in that behalf; and the plaintiff was obliged to pay, and did pay, the same drafts and the stamps thereon, and the bank and other expenses connected therewith, And the plaintiff claimed \$70,000.

Pleas :

1. To first count, never indebted.
2. To second count, *non est factum*.
3. To second count, denial of all the alleged breaches.
4. To the whole declaration, that after said claims accrued, and before this suit, the plaintiff by deed released the defendant therefrom.

5. To the whole declaration, that the money claimed in the first count is the same identical money and for the same causes of action as the money claimed and the causes of action sued for in the second count; and that after the accruing of the plaintiff's claim, and before this suit, the plaintiff and the defendant made and executed a certain agreement under seal, bearing date the 14th day of May, 1878, called a deed of release, which said deed of release was in the words and figures following: "This memorandum of agreement, made and executed at the village of Aylmer, in the county and district of Ottawa, between Alexander Fraser, of the township of Westmeath, in the county of Renfrew, and province of Ontario, lumber merchant, party of the first part, and Hector Mayne McLean, of the township of Eardley, in the county and district of Ottawa, lumber merchant, party of the second part, wit-

nesseth, that whereas on the 25th of July, 1873, the said parties hereto, in the presence of one Daniel Wade, entered into an agreement for the purchase and sale by the said party of the first part unto the said party of the second part of those certain timber berths or limits on the Coulonge and Black rivers more fully described in the licenses thereof from the Crown, signed by Alexander J. Russell, Esquire, Crown timber agent at Ottawa, to the said party of the first part, which said licenses are numbered 403, 404, 405, 406 and 407 respectively, for the years 1871 and 1872, together with the timber berths or limits on the north east side of Black River aforesaid, containing about 21 square miles, more or less, which was at one time purchased by Messrs. James Colton & Co., from Messrs. McCauchon & McCuaig, and which is described in the license thereof from the Crown signed as aforesaid to the said Alexander Fraser, and numbered 397, for the said years 1871 and 1872, together with all the farms and other improvements on the said limits, and also all the horses, rafts, and shanties, rigging, and other lumbering effects purchased by the said Alexander Fraser from Messrs. James Colton & Co. And whereas the said agreement was so made and entered into in consideration of the payment by the said party of the second part unto the said party of the first part, of the sum of money in the said agreement set forth; and whereas the said party of the second part has not been able to carry out the said agreement; and whereas the said parties hereto have mutually agreed to cancel, annul, and set aside the same—Now these presents witness that, in consideration of the said party of the second part being released of and from all obligations and indebtedness unto the said party of the first part, except in so far as is set forth and expressed in and by a certain deed of composition executed this day between the parties hereto, and to be executed by other of the creditors of the said party of the second part, they, the said parties, have, as by these presents they do cancel, annul and set at naught that certain agreement hereinbefore described for the purchase of

the said limits; and in lieu of the horses, farms, and shanty rigging in the said agreement set forth, he, the said party of the second part, doth give, transfer, and make over all the farms and improvements, and also all the lumbering effects, shanty rigging, and farms on the said limits, or with the said raft now on its way to Quebec, and belonging to him, and also six horses heretofore used by him in his said lumbering operations. And the said party of the first part doth hereby relieve the said party of the second part from all obligations under the said agreement except in so far as he is bound unto him under and by virtue of the said deed of composition; and the said party of the second part doth relieve the said party of the first part of his obligations unto him under and by virtue of the said agreement of July, 1873."

Averment—That the deed referred to in the said deed of release was the deed set out and declared on in the second count of the declaration; and that nothing contained in the said deed of release referred to as a deed of composition affected the operation of the said deed of release as a satisfaction of the obligations under the said deed in the second count mentioned; and the defendant duly did and performed all things on his part to be done and performed according to the terms of the said deed of release, and the said deed of release was so made and executed and the said things were so done and performed by the defendant, and were accepted by the plaintiff, in satisfaction and discharge of the plaintiff's claim.

Sixth plea, to the whole declaration—That the money claimed in the first count is the same identical money and for the same causes of action as the money claimed and the causes of action sued for in the second count, and that after the accruing of the plaintiff's claim and before this suit, the plaintiff and the defendant made a certain agreement under seal, bearing date the 14th day of May, 1878, in the words and figures in the fifth plea mentioned, and therein and thereafter called a deed of release, and at the same time, and as part of the same

transaction, the defendant made a certain agreement under seal with the plaintiff, and divers other of the creditors of the said defendant, thereafter called a composition deed, which said composition deed was in the words and figures following: "This indenture made and executed between Hector Mayne McLean, of the township of Eardley, in the county and district of Ottawa, trader, party of the first part, and Alexander Fraser of the township of Westmeath in the county of Renfrew, trader, Ezra B. Eddy, of the city of Hull, trader; Wm. B. McAllister, of the township of Eardley, trader; Archibald McLean, of the township of Eardley, trader, Edward McGillivray, of the city of Ottawa, trader; Michael Hughes, of the township of Litchfield, trader; C. King & Co., of the said city of Ottawa, traders; R. W. Cruice, of the said city of Ottawa, trader; Charles McColgan, of the village of Quio, shoemaker; F. McDougal, of the said city of Ottawa, trader; Joseph Aum, of the village of Quio, blacksmith; George Hodgins, of the township of Clarendon, farmer; E. A. Cole, of the village of Aylmer, trader; party of the second part (each of the said party of the second part acting to the effect hereof for himself): Witnesseth, that whereas the said party of the first part is unable to meet his obligations towards the several parties of the second part, and the said several parties are willing to reduce the several amounts due by him unto them to twenty-five cents in the dollar, as set forth in the schedule hereunto annexed; the said several amounts, however, to be subject to verification as to the amount actually due, and in the event of there being any disagreement between the said party of the first part and any one of the said parties of the second part as to the amounts actually due, the same shall be left to the final arbitrament and decision of the Honourable Levi Ruggles Church, whose decision, after examination of vouchers, or in any other manner he may select to determine the same, shall be final and binding on all parties as to the amount due unto any one of them by the said party of the first part—witnesseth that the said

several parties forming the party of the second part to this agreement, hereby agree to accept from the said party of the first part the sum of twenty-five cents currency for each and every dollar [now due unto him or them by the said party of the first part, which said composition money shall become due, payable and exigible as follows : so soon as a certain raft of timber, now belonging to the said party of the first part, shall have reached the port of Quebec, and have been disposed of and the proceeds realized, the net proceeds over and above such sums of money as may be required to take the said timber to market, and to pay all charges due thereon, other than the parties to this agreement, shall be equally divided amongst the said parties of the second part, in equal proportions (*in pro rata*) to the amounts severally due to them by the said party of the first part ; and as to the balance, whatever the same may be, the same shall become due, payable, and exigible in and by two equal instalments, of which the first shall become due in two years from and after the date of the execution of these presents ; and the second or last instalment in three years from and after the execution hereof. And it is agreed that the said composition money shall not bear interest. And as security for the due faithful and punctual payment of the aforesaid composition money, as appears in the schedule hereunto annexed, he, the said party of the first part, hath, as by these presents he doth mortgage, hypothecate (*hypothèque*), and affect, to and in favour of the said several parties of the second part, unto each for the amount which appears due unto him as composition money in and by the said schedule, the following lots, pieces, parcels, prices, or lots of land, to wit, lot 18, the north half of lot number 19, lot 20, lot number 21, and the east half of lot number 22, (except some fifteen acres thereof, be the same more or less, heretofore by him sold unto William B. McAllister,) all of said lots, or portions of lots, being in the 11th range of the aforesaid township of Eardley ; also lot number 19, lot number 20, lot number 21, the south half of lot number

22, lot number 23, and the north half of lot number 26, all of said lots being and lying in the 12th range of the aforesaid township of Eardley, and the south half of lot number 21 in the 13th range of Eardley aforesaid, with the appurtenances unto the said several pieces of land belonging. And it is hereby expressly agreed and declared that, so soon as the several amounts due unto any one of the said parties hereto by the said parties of the first part, to wit, the amount of the said composition money, shall have been paid, he or they shall be forthwith bound and obliged to execute to and in favour of the said party of the first part a good and sufficient discharge of the full amount of his or their claim against the said party of the first part, and to execute a good and sufficient release and discharge of the mortgage which has been executed in his or her favour by these presents. And to enable the said party of the first part to transfer his aforesaid timber to market, the said Alexander Fraser hereby agrees to advance unto him such funds as are necessary to enable him to do so, and to pay all charges thereon on the arrival of the said timber at market; and for such advances it is agreed and understood the said Alexander Fraser shall have a preferential claim upon the proceeds of the said timber to the amount thereof and be paid by preference said amount over and beyond all other creditors, together with interest upon such advances at and for the rate of nine per centum per annum. And it is hereby agreed that on arrival of the said timber at Quebec the said party of the first part, by and with the advice of Messrs. Fraser, Eddy, and McAllister, shall sell the said timber, or if it be determined to hold over the same from sale for a limited period, then the said party of the first part shall arrange by or through some bank or otherwise for the repayment of the said advances made by the said Alexander Fraser aforesaid, under the advice of the said Messrs. Fraser, Eddy, and McAllister. To avoid doubts, and to remove any difficulty as to the determination of the precise amount due unto the said Alexander Fraser, it is hereby declared that the com-

mission to be charged on his account, which is to be submitted to and verified by Mr. Church, shall be five per cent., as per the written agreement heretofore existing between him, the said party of the first part, and the said Alexander Fraser, but for the current year the same shall be only two and a half per centum. And it is hereby further agreed and understood that, as to the unpaid balance of moneys due by H. N. Jones, of the city of Quebec, and arising out of the agreement respecting the timber in his hands, and made by the said party of the first part, that the same shall be wholly applied to and deducted from the total indebtedness of the said party of the first part unto the said Alexander Fraser, and not from the reduced amount (composition money); and in the event of the said H. N. Jones not satisfactorily arranging and paying for the same, it is understood and agreed that after advising with Messrs. Eddy & McAllister the said Alexander Fraser shall sell the said timber and apply the proceeds towards the reduction of the debt due him by the said party of the first part in manner lastly above described. And it is hereby declared that it is supposed the value of said timber or claim against said H. N. Jones, is about \$5,000; and it is hereby declared that in fixing the amount due to the said Alexander Fraser, there is to be deducted from the gross sum due him \$30,000 currency, as and for the consideration money for the retrocession of the limits which the said Fraser agreed to sell unto the said party of the first part, and which said promise of sale has this day been cancelled and set at nought.

Averment, that the deed referred to in the said deed of release, is the deed set out and declared on in the second count of the declaration, and the plaintiff and the defendant duly executed the said deed of release, and the said composition deed, and the said composition deed was also duly executed by divers other creditors of the said defendant, and the said deed of release and the said composition deed were so made and executed by the defendant, and were accepted by the plaintiff, in satisfaction and discharge of the plaintiff's claim.

Seventh plea to the whole declaration, that the money claimed in the first count, is the same identical money, and for the same causes of action as the money claimed and the causes of action sued for in the second count; and that after the accruing of the plaintiff's claim, and before suit, the plaintiff and the defendant made a certain agreement under seal bearing date the 14th day of May, A.D. 1878, and hereinafter called a deed of release, which said deed of release is in the words and figures set out in the fifth plea, hereinbefore pleaded, and at the same time, and as part of the same transaction, the defendant made a certain agreement under seal with the plaintiff, and divers other of the creditors of the said defendant, hereinafter called a composition deed, which said composition deed was in the words and figures set out in the sixth plea hereinbefore pleaded; averment, that the deed referred to in the said deed of release is the deed set out and declared on in the second count of the declaration herein, and the plaintiff and the defendant duly executed the said deed of release and the said composition deed; and the said composition deed was also duly executed by divers other creditors of the said defendant.

Averment—that the plaintiff and the defendant disagreed as to the amount of the indebtedness of the defendant to the plaintiff at the time of the execution of the said composition deed; and the said amount was never settled or ascertained by the said the Honorable Levi Rugles Church or otherwise.

Eighth plea, to the whole declaration—that the money claimed in the first count is the same identical money and for the same cause of action as the money claimed and the causes of action sued for in the second count; and that after the accruing of the plaintiff's claim and before this suit, the plaintiff and defendant made a certain agreement under seal, bearing date the 14th day of May, A.D. 1878, and hereinafter called a deed of release, which said deed of release is in the words and figures set out in the fifth plea hereinbefore pleaded; and at the same time, and as

part of the same transaction, the defendant made a certain agreement under seal with the plaintiff and divers others of the creditors of the said defendant, hereinafter called a composition deed, which said composition deed is in the words and figures set out in the sixth plea hereinbefore pleaded; averment—that the deed referred to in the said deed of release is the deed set out and declared on in the second count of the declaration; and the plaintiff and the defendant duly executed the said deed of release and the said composition deed, and the said composition deed was also duly executed by divers other creditors of the said defendant; averment, that the plaintiff and the defendant disagreed as to the amount of the indebtedness of the defendant to the plaintiff at the time of the execution of the said composition deed, and the plaintiff and the defendant thereupon, in pursuance of the said composition deed, requested the said the Honorable Levi Ruggles Church, in the said deed named, to take upon him the burthen of the said reference, and to determine the amount of the alleged indebtedness of the defendant to the plaintiff, and the said the Honorable Levi Ruggles Church thereupon accepted the said reference, and took upon him the burthen thereof; and the said reference was pending and undetermined at the commencement of this suit.

Ninth plea, to the whole declaration—that the money claimed in the first count is the same identical money, and for the same causes of action, as the money claimed and the causes of action sued for in the second count; and that after the accruing of the plaintiff's claim, and before this suit the plaintiff and the defendant made a certain agreement under seal, bearing date the 14th day of May, A. D. 1878, and hereinafter called a deed of release, which said deed of release is in the words and figures set out in the fifth plea hereinbefore pleaded; and at the same time, and as part of the same transaction, the defendant made a certain agreement under seal with the plaintiff and divers other of the creditors of the said defendant herein

after called a composition deed, which said composition deed is in the words and figures, set out in the sixth plea hereinbefore pleaded; averment, that the deed referred to in the said deed of release, is the deed set out and declared on in the second count of the declaration herein, and the plaintiff and the defendant duly executed the said deed of release and the said composition deed, and the said composition deed was also duly executed by divers other creditors of the said defendant; averment, that all things and all conditions to be by the defendant performed and fulfilled under the terms, conditions, and provisions of the said deeds of release and composition have been fulfilled and performed by him, and the plaintiff accepted said deed of release and the said composition deed, and the performance and fulfilment of the terms and conditions thereof, by him the defendant to be performed and fulfilled, in full satisfaction and discharge of the causes of action in the said declaration mentioned.

10th plea to the whole declaration, set off.

11th plea—payment

Joinder of issue on all defendant's pleas.

Second replication to the fourth plea—that the defendant procured the plaintiff to execute the said deed in the fourth plea mentioned by fraud, covin, and misrepresentation.

Second replication to the fifth plea on equitable grounds—that the defendant before the execution of the said agreement under seal, set forth in the said fifth plea, and before the execution by the plaintiff of the deed of composition referred to in the said memorandum under seal, falsely and fraudulently represented to the plaintiff that he, the said defendant, was indebted to divers persons in the said deed named in sums greatly in excess of the sums which he really owed them, that is to say, to E. B. Eddy in the sum of \$32,142.97; whereas in truth the defendant really owed the said E. B. Eddy a much less sum, to wit, the sum of \$5; to W. B. McAllister in the sum of \$9,555; whereas in truth the defendant really owed the said W. B. McAllister a much less sum, to wit, the sum of \$4; to Archibald McLean in the sum of \$681.66; whereas in truth the defendant

really owed the said Archibald McLean a much less sum, to wit, the sum of \$10; to E. McGillivray in the sum of \$438.88; whereas, in truth, the defendant really owed the said E. McGillivray a much less sum, to wit, the sum of \$10; to Michael Hughes in the sum of \$274.53; whereas in truth the defendant really owed the said Michael Hughes a much less sum, to wit, the sum of \$10; to C. King & Co. in the sum of \$128.87; whereas in truth the defendant really owed the said C. King & Co. a much less sum, to wit, the sum of \$10; to R. W. Currie in the sum of \$110.82; whereas in truth the defendant really owed the said R. W. Currie a much less sum, to wit, the sum of \$10; to Charles McColgan in the sum of \$116.50; whereas in truth the defendant really owed the said Charles McColgan a much less sum, to wit, the sum of \$10; to F. McDougal in the sum of \$190.25; whereas in truth the defendant really owed the said F. McDougal a much less sum, to wit, the sum of \$10; to Joseph Aum in the sum of \$135; whereas in truth the defendant really owed the said Joseph Aum a much less sum, to wit, the sum of \$10; to George Hodgins in the sum of \$151.30; whereas in truth the defendant really owed the said George Hodgins a much less sum, to wit, the sum of \$10; to E. A. Cole in the sum of \$140; whereas in truth the defendant really owed the said E. A. Cole a much less sum, to wit, the sum of \$10 * * and thereby induced the plaintiff to believe that the defendant was insolvent, and that his estate would only pay the sum of 25 cts. on the dollar, and thereby induced the plaintiff to execute the said deed of composition and discharge, and the said agreement under seal in the said fifth plea mentioned and set forth; averment, that the plaintiff has never taken any benefit under the said deed of composition and discharge; and that, immediately after discovery by him of the said misrepresentation of the defendant, and before the commencement of this action, he formally repudiated the said deed and notified the defendant of such repudiation, and offered to carry out the said agreement for sale, and has always been ready and willing, and still is ready and willing, to carry out the same.

Second replication to sixth plea, same as the second replication to fifth plea down to * and then as follows: and by means of the said false and fraudulent representation induced the plaintiff to execute the said deed in the said sixth plea set forth; averment, that he has never taken any benefit under the said deed of composition and discharge; and that the plaintiff immediately after the discovery of the said misrepresentation by the defendant, repudiated the execution of the said deed of composition and discharge, and notified the defendant of such repudiation, and demanded the performance by the defendant of the contracts in the said declaration mentioned.

Second replication to seventh plea, same as second replication to fifth plea down to * , and then as follows: and by means of the said false and fraudulent representations induced the plaintiff to execute the said deeds in the seventh plea mentioned; and the plaintiff in consequence of the said fraud revoked the said submission to the said Levi Ruggles Church.

Second replication to eighth plea, same as second replication to fifth plea down to * and then as follows: and by means of the said false and fraudulent representations induced the plaintiff to execute the said deeds in the said eighth plea mentioned, and the plaintiff in consequence of the said fraud revoked the said submission to the said Levi Ruggles Church.

Second replication to ninth plea, that the defendant procured the plaintiff to execute the said deeds in the said ninth plea mentioned by fraud, covin, and misrepresentation.

Issue.

The cause was entered for trial at the last Spring sittings of the Court of Chancery, at Ottawa, and was heard by Blake, V. C.

The deed declared on in the second count, the deed set out in the fifth plea, and the deed set out in the sixth plea, were all produced and proved, the schedule annexed to

which last mentioned deed was as follows: "Schedule of debts referred to in agreement hereto annexed":—

Name.	Amount Due.	Amt. of Composition.
E. B. Eddy	\$32,142 97	
Alex. Fraser	52,000 00 (reduced)	\$13,000 00
W. B. McAllister	9,555 00.....	2,333 75
Archibald McLean ..	681 66.....	170 41
E. McGillivray.....	438 88.....	109 72
Michael Hughes	247 53.....	61 88 $\frac{1}{4}$
C. King & Co.	128 87.....	32 21 $\frac{3}{4}$
R. W. Cruice	110 82.....	27 70 $\frac{1}{2}$
Charles McCologan..	116 50.....	29 12 $\frac{1}{2}$
F. McDougal	190 25.....	47 56 $\frac{1}{4}$
Joseph Aum.....	135 00.....	33 75
George Hodgins	151 30.....	37 82 $\frac{1}{2}$
E. A. Cole.....	140 00.....	35 00

The last mentioned deed was also proved to have been registered in the registry office for the county in which the lands mentioned therein were situate. It appeared in evidence that in the spring of 1878, the defendant being or pretending to be unable to meet his engagements, represented this fact to the plaintiff, and also represented that Eddy and McAllister were creditors of his, each to a large amount: that at that time he was indebted to the plaintiff in respect of the covenants contained in the deed declared on in the second count to the amount, as claimed by the plaintiff, of over \$80,000: that the defendant called a meeting of his creditors, and that the result was, that the plaintiff agreed to take back the timber limits and property mentioned in the instrument set out in the fifth plea; and it and the deed mentioned in the sixth plea were drawn up and executed. It appeared that the plaintiff took possession of the property so taken back, but it did not appear what, if anything, had been done with it since. It appeared also that the plaintiff had received the advances made by him to take the raft mentioned in the deed of composition to Quebec, but had received no portion of the proceeds of the sale of the raft: that he received \$2,434.53 from H. N. Jones mentioned in the

deed of composition; that the plaintiff never before action offered back to the defendant the property mentioned in the deed set out in the fifth plea, nor the moneys received by him from Jones; nor did he offer to release the security given to him by the deed of composition; nor did he do any act disaffirming what had been done, till he brought this action. It also appeared that before the trial of this action, Eddy and McAllister had been paid the composition upon their alleged debts; and that all the other creditors of the defendant had been paid in full. Eddy, Eddy's manager, McAllister, and the defendant were examined as to the debts alleged to be due by the defendant to Eddy and McAllister, respectively.

On motion for a nonsuit made at the close of the plaintiff's case, the learned Vice Chancellor nonsuited the plaintiff, giving the following judgment: "I think that in this case the plaintiff has proved so far as Eddy is concerned that there was no debt, and that to this extent he has established his case, but he has not shewn that he disaffirmed the transaction before action brought, that he offered to replace the defendant in the position he occupied before the impeached transaction was entered into, nor that he is in a position to do so now. I therefore rule that as he has not proved the other portions of his pleadings he is not entitled to succeed. I offer to take the evidence on the part of the defendant, which Mr. Gormully declines to give."

May 19th, 1881. *Bethune*, Q. C., moved for a *rule nisi* to set aside the nonsuit and to enter a verdict for the plaintiff, with a reference to the Master of the Court of Chancery at Ottawa, or to the Judge of the County Court of the county of Carleton, to compute the amount of the plaintiff's claim, as arranged at the trial, if the plaintiff should be found entitled to recover, on the ground that the plaintiff proved the right to recover as against the defendant, the learned Vice Chancellor having found that the replication of fraud in the obtaining of the re-

lease by the defendant from the plaintiff was proved ; or why, if necessary, a new trial should not be had between the parties.

June 1st, 1881. *McCarthy*, Q. C., (with him *Chrysler*), shewed cause. The defendant contends that the plaintiff cannot succeed in this action even if the finding of the Judge who tried the case is assumed to be correct, because he had received under the deed the concession of valuable timber limits, as well as a large amount of chattel property, and security for the payment of composition upon other land of the defendant: that the plaintiff, seeking to set aside a deed for fraud, must repudiate the deed at the earliest practicable moment after the discovery of the fraud, rescind the contract, and restore any benefit received by him ; and that where the action is brought by plaintiff this should be done before bringing his action. He cited *Dawes v. Harness*, L. R. 10 C. P. 166; *Brolch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324; *Lawton v. Elmore*, 27 L. J. Ex. 141; *Urquhart v. Macpherson*, L. R. 3 App. 837.

Bethune, Q. C., supported the rule, and referred to *Bigelow on Fraud*, 411; *Barr v. Doan*, 45 U. C. R. 499; *McCord v. Harper*, 26 C. P. 103; *Saving v. Gale*, 28 Indiana 486.

November 26, 1881. HAGARTY, C. J.—By the settlement of May 14th, 1878, the plaintiff took back from the defendant the timber limits and specified chattels conveyed to the latter in 1873, with many peculiar covenants and stipulations.

The price was \$85,000, payable in eight annual instalments with interest, defendant paying all ground-rent, &c., with 5 per cent. commission on lumber already manufactured, and the like commission yearly on all lumber manufactured, with covenant by the defendant to get out so much timber each year: that the plaintiff should make advances to \$40,000 a year for seven years to assist defendant in getting out the timber, on certain conditions, all such advances to be secured on the limits, and also any

ground rents or charges which plaintiff had paid or might become liable for, with power of sale on default, &c., of the limits, and all timber cut, and all goods and chattels. Then, on the 14th May, 1878, an agreement is made between the plaintiff and defendant reciting defendant's inability to carry out the contract of 1873. In consideration of defendant being relieved from all obligation to plaintiff (except as expressed in the creditors' deed of same date) the agreement of 1873 for the purchase of the limits is annulled and set at naught; and, "in lieu of the horses, farms, and shanty rigging in said agreement set forth," the defendant transfers all the farms and improvements, and all the lumbering effects, shanty rigging, and farms on such limits, or with the raft now on its way to Quebec and belonging to defendant, and also six horses used in lumbering operations.

Each party then relieves the other from all obligations under the agreement of 1873, except as provided in this composition deed.

The composition deed, to which plaintiff is a party as a creditor, binds the creditors to accept in full 25 cents in the dollar.

All the debts in the schedule are subject, as to verification as to amount, to the arbitrament of Mr. L. R. Church, whose decision shall be final and binding on all parties as to the amount due. This composition was to be payable so soon as a raft belonging to defendant should reach Quebec and the proceeds be realized, and after net proceeds so applied the balance to be paid in two or three years without interest. Defendant, as security, assigns certain lands, with covenant that when the composition shall have been paid the creditors shall execute a full discharge of their claims and of the mortgage thus created in their favour.

Then it is agreed that, to enable defendant to transport his timber to market, the plaintiff agrees to advance to him sufficient funds to enable him so to do, and to pay, &c.; and for such advances plaintiff was to have a preferential claim on the proceeds of the timber over and above the other

creditors, with interest, the timber to be sold or held over under the advice of plaintiff and other named creditors.

And to prevent doubt, &c., the determination of the precise amount due to the plaintiff for commission under his agreement, to be verified by Mr. Church, shall be 5 per cent., but for the current year only $2\frac{1}{2}$ per cent.

Then it is declared that, as to the unpaid balance due by Jones, of Quebec, arising out of the agreement respecting the timber in his hands and made by defendant, that the same shall be wholly applied to and deducted from the total debt of defendant to plaintiff, and not from the reduced amount of composition money; and if Jones would not satisfactorily arrange and pay for same, then the plaintiff, after advising with two other named creditors, should sell the timber and apply the proceeds towards the reduction of the debt due him by defendant; and it was supposed the value of the timber with Jones was about \$5,000.

And it was declared that, in fixing the amount due to plaintiff, there was to be deducted from the gross sum due him \$30,000, as and for the consideration money for the retrocession of the limits which he had agreed to sell to defendant, and which promise of sale has this day been cancelled.

It is to be observed that there is nothing said in the deed of retrocession between plaintiff and defendant as to the price or sum at which the limits are to be taken back. This important matter is settled by the contemporaneous deed of composition with the creditors.

I understand that the plaintiff received back his moneys advanced to get down the raft, and about \$2,000 or \$3,000 from Jones, of Quebec. I also understand that since the bargain the plaintiff has been in possession of the limits re-assigned to him, and received the chattel property, horses, &c., assigned to him in lieu of what he had given to defendant in 1873.

We do not know whether the retrocession of the limits to him has been a profitable transaction or otherwise.

The difficulty in his contention is this: can he now avoid the release in the composition deed, and at the same time retain the limits and the properties and advantages received by him thereunder?

He seeks to treat the taking back of the limits and property at a named sum as one transaction, which can be upheld as valid and binding, and claim the whole of the residue of his claim in consequence of the fraud practised as to Eddy's claim. I see much difficulty in this position.

The whole arrangement effected by the deeds of May, 1878, was void or voidable at the option of the person said to be defrauded; and it remained existing and binding until he sought to repudiate it. On proof of the fraud he can refuse to be bound by it in any way, provided he be in a position to repudiate the whole; but, speaking generally, he cannot retain any benefit under the arrangement and dispute his being bound by other parts of it.

If he can place his case merely as that of a creditor who receives a part payment of his claim, and is then by his debtor's fraud induced to release his right to the residue, we can understand such a position.

But I cannot treat this case as presenting such a view. It seems to me impossible to hold that the plaintiff and defendant, first, by an independent arrangement, reduced the former's claim by a re-conveyance of the limits, &c., at a fixed sum, like, as it were, a payment on account, and then by another arrangement with the body of creditors agrees for a composition of 25 cents on the dollar.

I cannot read the deeds without regarding the whole as one arrangement, impossible to be disconnected as the plaintiff desires.

The connexion may be fairly tested in this way. If plaintiff sought to disaffirm and annul the whole dealing, both as to the retrocession of the limits and the release, would it be possible for the defendant to insist on holding him to the retrocession at the named price, on the ground that it was a transaction independent of the composition and release?

The general principle is distinctly stated in the Privy Council, in 1878, in *Urquhart v. Macpherson*, L. R. 3 App. 837: "Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. The plaintiff has taken the whole benefit of the deed so far as it was beneficial to him, without at any time attempting to repudiate it; and it now being impossible to restore the defendant to his original position, he seeks to destroy one particular part of the contract, and that their Lordships think he cannot do."

"If" (they proceed) "authority were wanted in support of a principle so common, * * it may be found in the case of *Clarke v. Dickson*, E. B. & E. 148. In that case, Mr. Justice Crompton says: 'When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that when that party exercises his option to rescind the contract he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract.'"

In *Reese River Silver Mining Co. v. Smith*, in the House of Lords, L. R. 4 H. L. 64, Lord Hatherley states the law much to the same effect. He states the law to be, that the agreement subsists until rescinded, in this sense: "until rescinded by the declaration of him whom you have sought to bind by it, that he no longer accepts the agreement, but entirely rejects and repudiates it." On the general principle, see *Clough v. London and North Western R. W. Co.*, L. R. 7 Ex. 26.

In *Urquhart v. Macpherson*, already cited, the action was for breaches of covenant in articles of partnership. The partnership was dissolved by an instrument with many stipulations and agreements. The defendant had brought certain lands into the partnership, and on the dissolution some of these lands were assigned absolutely to plaintiff,

who was to have the assets and pay the debts. Then each party released the other from all matters touching the joint trade, without prejudice to the agreements contained in the deed of dissolution. This release was pleaded to the breaches of contract on which the action was brought, and the plaintiff replied that the release was obtained by fraud.

The Court in Australia, and the Privy Council in appeal, held that it was "impossible to sever this release from the rest of the deed. There is but one contract for the dissolution of partnership, though containing many terms, of which this release is one. It is expressly said to be made 'in consideration of the premises,' that is, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, and his own runs, which at the end of the partnership would otherwise have reverted to him. Then, if the release cannot be separated from the rest of the contract it falls within the ordinary principle. * * * The plaintiff was not without remedy. He was entitled to an action founded upon the fraud in which he would recover the true amount of damages which he had sustained."

Clarke v. Dickson was an action to recover back the money paid for shares which the plaintiff had been induced to take by fraudulent representations of defendant. It was held that he could not recover, having received dividends on his stock. The general principle was stated by Crompton, J., as already cited,

On the evidence before us, I think we must regard the settlement of May 14, 1878, as all one transaction: that the agreement with the creditors to accept 25 cents in the dollar cannot be separated from the other term of the bargain—the taking back of the limits and chattel property at a fixed sum of \$30,000.

The plaintiff's proper remedy seems to me to be an action for damages caused by defendant's deceitful practice. The true measure of damage would be there recovered.

If it could be shewn that the retrocession of the limits

and release of the plaintiff from all his contracts on the sale thereof was a matter of large profit and substantial benefit to him, it would materially affect the damages; so, on the other hand, might proof of his having made a pecuniary sacrifice in consenting thereto.

As the case presents itself to me, I am compelled to hold that the learned Vice-Chancellor was right and the nonsuit should stand.

The plaintiff might be relieved on payment of costs, and go down again to trial, with a count added for the deceit.

ARMOUR, J.—The learned Vice-Chancellor was, in my opinion, right in his finding of fact, and wrong in his law, and the nonsuit should therefore be set aside.

The plaintiff was entitled upon the evidence, the fraud having been found, to recover the balance of his original claim after crediting the \$30,000, the amount agreed upon as the price of the property retroceded to him by the defendant, and after crediting whatever had been received by him from Jones.

It may be that the defendant was willing that a less price should be agreed upon for the retroceded property than it was actually worth, expecting to recoup himself the deficiency in value by the success of his fraud.

From such a result of his fraudulent design we cannot and ought not to relieve him.

No inference of this kind can, however, be drawn from the evidence, and so far as appears the price was the actual value of the property.

The plaintiff's original claim was reduced by the price agreed upon for the retroceded property, and the legal effect of its being so reduced was precisely the same as if it had been reduced by a payment in money itself of the like amount.

The defendant is therefore driven to maintain the proposition that if A. owes B. \$1,000 and by fraud induces B. to accept \$500 and release him, B. cannot, on discovery of

the fraud, sue A. for the \$500, the balance of his original claim, but must first pay or tender back to A. the \$500 he has received and sue for the whole of his original claim.

I asked on the argument for authority in support of so startling a proposition, but none was furnished, and I have since examined a multitude of reports of cases where creditors, after receiving a composition from their debtors and releasing them, and finding that a fraud had been practised upon them by their debtors, had sued for the balance of their original claim, and in no case have I found that the creditor had tendered or paid back the composition received by him, nor have I found it ever objected that he had not done so, or should have done so.

There is indeed a suggestion in favour of it in *Turner v. Bowerman*, 29 U. C. R. 187, but the suggestion is there founded upon the cases of *Clarke v. Dickson*, E. B. & E. 148; *Feret v. Hill*, 15 C. B. 207, and *Canham v. Barry*, 15 C. B. 597, none of which lend any countenance to such a suggestion.

It is trite law and plain equity that one cannot elect to rescind a contract for fraud, keep what he has got under it as the consideration for what he has given under it, and sue for what he has given as the consideration for what he has got: he must first give back what he has got as the consideration for what he has given, before he can sue for what he has given as the consideration for what he has got. This is what is meant when it is said that there can be no rescission without restitution.

No authority can, however, be found for the application of this rule to the case of debtor and creditor in such a manner as to compel the creditor, who has received from his debtor a certain part of his debt upon the execution by him of a release of the residue, to restore the part so received as a condition precedent to his avoiding the release of the residue on the ground of its having been procured from him by the fraud of the debtor.

The very terms of the rule exclude its application to such a case.

How, under the terms of this rule, is the plaintiff prevented from recovering the balance of his original claim? What consideration has he received for its release? None whatever. What must he restore therefore? Nothing. He holds, it is true, a security from the defendant on the defendant's land for the payment of one-fourth of it, but that is not a consideration, it is a mere security for its payment, and how does it prevent a recovery for the other three-fourths? In no way. The whole composition agreement was a voluntary one on the plaintiff's part; he was entitled to his whole claim totally irrespective of the composition agreement, it was a past due debt owing to him by virtue not of the composition agreement, but by virtue of a previously existing contract.

The true way of testing the matter is this: Set aside the composition agreement and see if the plaintiff has received anything which it would be inequitable for him to keep. He has been paid \$30,000, part of the debt due to him, and that ought to have been paid to him. It was his. Why should he pay it back? Why is it inequitable that he should keep what, by virtue of the pre-existing contract, belonged to him? What has he got for the residue of his claim?—a security for one fourth of it and nothing for three fourths. Why is it inequitable that he should hold, this security when he ought to have had the money it represented? In no way. If the defendant pays the money secured, the security will be released.

The case of *Urquhart v. Macpherson*, L. R. 3 App. 831, was relied upon in argument as a direct authority governing the case in hand. As I read that case it bears no analogy to this.

The action there was brought upon certain covenants contained in a partnership deed. There had been a deed of dissolution of the partnership by which all the partnership property and assets were transferred to the plaintiff, who was to pay all the partnership liabilities, and by which certain lands which had belonged to the defendant were assigned by him to the plaintiff—in effect, a sale by one

partner to the other of all his interest in the partnership property and assets, and of certain lands of his own. This latter deed contained a mutual general release, made in consideration of all the premises, which release was pleaded in bar of the action so brought, and to which was replied fraud. The plaintiff had taken the whole benefit of the deed of dissolution.

It was argued that the release might be severed from the rest of the deed of dissolution, and might then be avoided so as not to prevent the action on the covenants in the deed of partnership.

The judicial committee, in giving judgment, said: "It seems to their Lordships impossible to sever this release from the rest of the deed. There is but one contract for the dissolution of partnership, though containing many terms, of which this release is one. It is expressly said to be made in 'consideration of the premises,' that is, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, and his own runs, which at the end of the partnership would otherwise have reverted to him. Then, if the release cannot be separated from the rest of the contract it falls within the ordinary principle."

That was not a case between debtor and creditor; and the plaintiff there had obtained by the deed of dissolution what he would not have been entitled to without it, and what it would have been inequitable for him to retain, the release being avoided; whereas in this case the plaintiff has obtained nothing by the composition agreement which he would not have been entitled to without it, and which it would be inequitable for him to retain, the composition agreement being avoided.

If disaffirmance were required in a case like the present, the bringing of the action was a sufficient disaffirmance.

I refer to *Skilbeck v. Hilton*, L. R. 2 Eq. 587; *Vine v. Mitchell*, 1 Moo. & Rob. 337; *Ex parte Gilbey*, L. R. 8 Chy. Div. 248; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; and *Maturin v. Tredennick*, 12 W. R. 740.

The rule should be absolute to set aside the nonsuit and for a new trial, without costs.

CAMERON, J.—At first I thought the case might perhaps be treated as if, at the time of the settlement in May, 1878, the defendant was indebted to the plaintiff in \$85,000, and had agreed to accept \$30,000 of that sum in the return or retrocession of the timber limits, leaving a balance of \$55,000 due to the plaintiff, in payment of which he was to accept, in common with other creditors, a composition of 25 cents on the dollar. Could it have been so treated I should not have thought the plaintiff would have been precluded from setting up the alleged fraud of the defendant, in representing himself as largely indebted to Mr. Eddy, when he was not in fact so largely indebted, without having repudiated the arrangement and restored to the defendant the retroceded timber limits, in answer to the plea of release of the debt. But, after consideration of the original agreement and the settlement of May, 1878, it is, in my opinion, manifestly within the rule stated by Sir Montague Smith, in the Privy Council, in *Urquhart v. McPherson*, L. R. 3 App. 837, as governing questions such as this case presents. He states the principle thus: "Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. The plaintiff has taken the whole benefit of the deed, so far as it was beneficial to him, without at any time attempting to repudiate it, and it now being impossible to restore the defendant to his original position, he seeks to destroy one particular part of the contract, and that their lordships think he cannot do. If authority were wanted in support of a principle so common as that to which their lordships have adverted, it may be found in the judgment of the Court below: *Clarke v. Dickson*. In that case Mr. Justice Crompton says: 'When once it is settled that a contract induced by fraud is not void, but

voidable at the option of the party defrauded, it seems to me to follow that when that party exercises his option to rescind the contract he must be in a state to rescind, that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

Applying that test to this case it is clear the parties cannot now be restored to the condition they were in in respect to the contract of 1873, for breach of which the plaintiff sues, at the time of the impeached contract or release in 1878. By the former contract many things were to be done by the plaintiff and defendant respectively that cannot now be done by reason of the lapse of time. The price the defendant was to pay for the limits and other property, the subject of the contract, was to be paid for by eight annual instalments. The plaintiff was to advance \$40,000 a year for seven years to assist the defendant in getting out the timber upon the conditions set forth in the agreement, and the defendant was to get out a certain quantity of timber in each year. If the release and whole agreement of 1878 are now held void it is not possible that the defendant can get out the timber or the plaintiff advance the \$40,000 a year in accordance with the contract, and so the parties cannot be remitted to the position they held in May, 1878. The plaintiff must therefore be left to the remedy provided for such a wrong as he complains of, that is to say, an action founded on the alleged fraud, in which he may recover the amount of any actual damage he may have sustained through or by reason of the fraud. It seems strange that he did not take the precaution to add a count for deceit to the other cause in his declaration; but he did not choose to do so, and the Court is now called upon to say whether, as the case appeared before the learned Vice-Chancellor, the nonsuit was right or not. I think it was, and that the rule should be discharged. The action was commenced before the Judicature Act came into force, and the defendant will not, by this conclusion, be deprived of the right to sue for the alleged fraud, if so advised.

Rule discharged.

PHILLIPS v. THE GRAND RIVER FARMERS' MUTUAL FIRE INSURANCE COMPANY.

Misrepresentation—Incumbrances—Fixtures—Waiver—Divisible contract.

The plaintiff and his brother being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense, built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "in fee;" and to the question—"Encumbered or not?" If yea, to what amount—how much land does incumbrance cover, and for what purpose erected?" he answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy. The verdict was for the plaintiff.

Held, (ARMOUR, J., dissenting) that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal.

Per CAMERON, J., the house was a fixture and subject to the mortgage. The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made."

Per CAMERON, J.—The policy was avoided only as to the insurance on the house.

The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution.

Held, that the defendants had not by the resolution waived their right to set up the defence.

Per ARMOUR, J.—The house was a chattel, and there was nothing in the application to estop the plaintiff from asserting that it was not insured as part of the land.

ACTION on policy of insurance, dated 16th day of April, 1880, to the effect following:—"These presents witness that Charles Phillips has made application, No. 427, bearing date the 24th day of February, 1880, and has given a premium note or undertaking to the Grand River Farmers' Mutual Fire Insurance Company (the sum of \$3.75); and in the said application it is stated that the buildings, premises, or

property hereby insured, are situated on lot 39, River Range, in the township of Seneca, county of Haldimand, and that the same is held by deed, subject to no incumbrance, and which said application is made a part and condition of this contract of insurance—dwelling house \$150, ordinary contents of dwelling house \$100—against all loss or damage by fire to the above described property, subject to the statutory conditions, variations, and additions in this policy mentioned, which are to be taken as part thereof. And the said company hereby agree with the assured, but subject to the conditions, variations, and additions aforesaid, that if the property above described, or any part thereof, shall be destroyed or damaged by fire at any time between the twenty-fourth day of February, 1880, and the twenty-fourth day of February, 1883, the company will make good such loss or damage to the amount not exceeding in respect of the several matters above specified the sum set opposite thereto respectively, nor exceeding, in the case of the destruction of a building, two-thirds of its actual proved cash value, and not exceeding in the whole the sum of \$250.”

The defendants pleaded, among other pleas not necessary to be considered, for a third plea, that the plaintiff was not at the time of the loss and damage interested in the said dwelling house and contents :

4. That the policy was made subject to certain terms or conditions endorsed on the said policy, one of which was that, in all cases of application for insurance, the applicant should state, among other things, whether the property was encumbered and, if encumbered then the applicant should state the true title, and the encumbrances on the premises, otherwise the policy granted thereon should be void ; and although the said property was encumbered by mortgages thereon, yet the plaintiff did not state in his said application that such was the fact, nor the true title and nature of the said encumbrance, but falsely stated in his said application that the said property was not encumbered, whereby the said policy became void under the said conditions.

5. As to so much of the plaintiff's claim as affected the buildings insured, that the policy was made subject to certain terms and conditions endorsed thereon, among which was one which provided that if any person should misrepresent or omit to communicate any circumstance material to be made known to the company in order to judge of the risk they might undertake, the insurance should be of no force in respect of the property in regard to which such misrepresentation or omission should be made; averment, that although the lands and buildings on the said property were encumbered by two several mortgages thereon, yet the plaintiff misrepresented and falsely stated to the said defendants, in his application for the said insurance, that the said property was not encumbered, which circumstance was material to be made known to the defendants in order to judge of the said risk; by reason of which false representation, the said insurance became of no force as affected the said building.

6. That after the alleged loss by fire under the said policy, the plaintiff falsely represented and swore, in his affidavit presented to the defendants with the statement of his loss, that the property insured was unincumbered, although in truth and in fact the same was heavily encumbered both at the time of his application and the making of the affidavit; averment, that, under the terms and conditions of the said policy, and by reason of the said false representations and false oath taken by the plaintiff, the plaintiff forfeited his rights under the said policy.

The plaintiff took issue upon these pleas, and also replied specially, that the property insured was not encumbered by mortgages; and also to the fourth, fifth, and sixth pleas a further special replication to each plea, in effect as follows: that the defendants ought not to be admitted to say that the policy in the declaration mentioned became void by reason of any of the matters in the said pleas pleaded, because that after the false statements, &c., and after the defendants had acquired, as in fact they had,

full notice and knowledge of the falsity of such statements the defendants passed a resolution in writing directing their treasurer to pay to the plaintiff the amount of his, the plaintiff's, loss, and did levy an assessment to cover such loss, and duly gave notice of the said assessment to the parties liable to contribute to such loss, and such parties duly paid to the defendants the amount of the said assessment, and they duly accepted and received the same, and still retained the same, whereby the defendants waived the avoidance of the said policy.

The defendants took issue upon the special replications, and also rejoined that the said resolution in the special replication mentioned was, before the commencement of the suit, revoked and cancelled by the defendants.

To this rejoinder the plaintiff demurred, on the ground that it was no answer to the waiver set up by the replication, and the revocation of their resolution after the waiver was no answer to the plaintiff's right to recover.

At the trial, which took place at the last Spring Assizes at Cayuga, before, Armour, J., and a jury, it appeared that Daniel Phillips, the father of the plaintiff, had conveyed the land on which the dwelling house was erected to the plaintiff and his brother, Edward Phillips, by deed, dated the 5th of November, 1878, subject to a mortgage for the sum of \$700, made by the said Daniel Phillips to one Samuel Cresswell, dated the 4th November, 1880, which mortgage he, Daniel Phillips, covenanted with the plaintiff and Edward Phillips he would pay and discharge; and that a mortgage from the plaintiff and his brother to their father for \$1,800, balance of purchase money, had been given, and both were unpaid at the time of the plaintiff's application for the policy, and were still outstanding and unpaid at the time of the loss by fire.

It also appeared that after these mortgages had been given the plaintiff leased his interest in the land purchased from his father to his brother Edward, who occupied the land, except a quarter of an acre on which the dwelling house insured was erected; and the plaintiff in his evidence

stated that he built the house upon the distinct understanding and agreement with his father and brother that if, for any cause, they should not be able to pay for the land, the house was to be his. In the shorthand notes his statement was as follows: "Before I started to build it I spoke to my father and brother. I told them if they would let me have a quarter of an acre of ground I would build a house, if they would agree that they would have nothing to do with the house in case we failed to pay. I was to do what I liked with it. My father and brother agreed to this. It was at my own expense, every dollar. The other places on the farm were insured in the London Company in our joint names. The policy is made payable to my father on account of his mortgage. * * I put up the house so that I could readily remove it. I set it on wooden blocks on the top of the ground. I did not fasten it down in any way. I never would have put it up but for that agreement. There was no encumbrance on this house—not a dollar on the contents. When I was asked in the application in reference to encumbrance I had reference to the house. Mr. David Finch took the application. He was the agent of the company. He solicited me to insure. My brother told me he asked him to insure the other place, and he told him they were insured. I told him, in reference to owning this house, I owned it myself. I told him my brother and I owned the farm. * * He asked me if there was anything against this house; I said no. I told him that the farm was not paid for; that there was a mortgage against the farm; there was nothing against the house. He filled in the application, all except my name at the bottom. I explained to him about the house, and that I owned the farm jointly. I told him all the circumstances in reference to the ownership of this property. I told him that me and my brother bought the place, and that we owned it jointly. As to the house, I built it at my own expense." In cross examination he said: "I told my father and brother I wished to build a house: that I had no house to live in, and if they would consent to let me have a quarter of an acre I

would build a house; and in case we failed to pay the house would be mine. They both agreed to this condition. I placed the house there. The house was to be mine. Nothing was said about the land. No person was present. It was a verbal agreement. Nothing more was said. * * I did not go to see Mr. Cresswell about it. The agent came to get me to insure. I told him we were owing on the farm. I did not tell him how much; he did not ask me. I would not say whether it was before or after I signed I told him that: it was just at that time. * * I did not explain how much we owed; he did not ask me."

The defendants' agent, David Finch, called by the defendants, swore: "I took the application. It is in my handwriting. I drew the application out. When we came to that (encumbrances) I said, 'Any incumbrance?' He said 'No.' Then I finished it. We were talking, and he said, 'There is a little back on the place that my brother and I have to pay, but,' he said, 'there is no encumbrance on this.'" "Did he tell you he separated the house from the farm, or anything of that kind"? Answer. "No explanation that I remember now." The learned Judge.—"What did you understand when he said there was nothing on the house, but something back"? Answer. "He said there was nothing on this property." In cross-examination he said: "I told the plaintiff and Mr. Wilson the other day that I was told at the time I took the insurance there was no encumbrance on the house. I did not ask plaintiff in reference to the farm. I did not ask how it was, or anything about it. I took it down as he told me. I asked if there was any encumbrance, and he said no. After that it was that he said there was a little on the place. I did not say any more. If I remember right, there was nothing more said." "Did you tell him at the time that you were asking about the house only"? "I forget. I only asked him if there was any encumbrance, and he said no. I don't remember asking him anything about the farm. I asked him if there was any encumbrance, and he said no encumbrance, and I put it down. After that he said they had a little on the land."

"You understood the question of title to apply to the house"?
 "I took it down as he said. I understood the question to apply to the house, to the property I was insuring."

The plaintiff's application was put in and proved. It was, as far as material, as follows: "Application of Charles Phillips, lot 39 concession River Range, for insurance against fire, by the Grand River Farmers' Mutual Insurance Company, for the sum of \$250 for three years, commencing on the 24th day of February, 1880, to wit: on dwelling-house \$150, ordinary contents, \$100." Then followed a number of questions and answers. 19. "Where are the above premises situated"? Ans. "In Seneca." 21. "Occupied by whom"? By applicant. 22. "Title—held in fee, or how"? "In fee." 23. "Encumbered or not, if yea, to what amount—how much land does encumbrance cover, and for what purpose erected"? "None."

At the head of the application there was in conspicuous type the following memorandum or direction:

"Agents must read the application over carefully to the applicant." But there was no statement that the applicant was to answer questions, or that any misstatement or misrepresentation would make the insurance void. The plaintiff signed the application. On the back of the policy were endorsed the statutory conditions provided by ch. 162, R. S. O., and in red ink was the following condition, among others, under the head "Additional Conditions:":

"No. 1. In all cases of application for insurance the applicant shall state the value of property, and also specify the land upon which the building or buildings are situated by its number and concession, or otherwise sufficiently particularize it; also, whether it be freehold or leasehold, or encumbered; or if encumbered, then the applicant shall state the true title and the encumbrances on the premises; otherwise the policy granted thereon shall be void * *."

The fire causing the plaintiff's loss occurred on the 17th day of May, 1880, and it was proved that the following resolutions had been passed by the defendants' Board of Directors: "July 21, 1880,—Moved by Mr. McNevin,

seconded by Mr. Harrison, that the treasurer is hereby authorized to pay the amount due Mr. C. Phillips, or to the respective parties authorized to receive the same."

York, August 30, 1880,—“Moved by Mr. Weir, seconded by Mr. Harrison, that portion of the resolution passed on July 21st, giving the secretary-treasurer authority to settle the claim of Charles Phillips, be and is hereby rescinded—the balance of the minutes as read be received and adopted.”

F. A. Nelles, the secretary of the company, in his evidence stated: “We are not in the habit of insuring property that is heavily encumbered. Had the incumbrances been stated in the application they would not have issued it (the policy). I first became aware of the encumbrance on the 14th day of August. I then received notice from one of the directors to go and search the registry office in Phillips’s case, and if all was not as represented to hold the money. I then went and searched on the 24th August, and found the incumbrance mentioned. I had no knowledge before of any incumbrance. I called a meeting of the directors for the 30th August, and at that meeting laid before the board of directors the incumbrance, and the first thing they did was to pass the resolution. At the time that resolution was passed we had not adopted the minutes of the preceding. There was no subsequent resolution directing payment. * * No intimation was given to me at any time that this house was just a chattel. We understood it was part of the property—part of the land.”

At the close of the plaintiff’s case the defendants’ counsel moved for a non-suit, on the ground that there was no case for the jury, as the house was not a chattel, and the evidence shewed the land was encumbered.

The learned Judge thought the question as to whether the house was a chattel or not was one for the jury, and he left it to them, telling them if they found it was a chattel the plaintiff was entitled to a verdict: that if it was part of the land then it was encumbered, and defendants were entitled to succeed: that it was for them to say whether from the intention of the parties it should be part

of the land or a chattel. Counsel for the defendants objected to the charge, on the ground that the learned Judge should have told the jury, as matter of law, the house was real estate, and without the consent of Cresswell, the first mortgagee, it could not have been a chattel.

The jury found for the plaintiff for \$215.

May 17, 1881. *Hardy*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a non-suit or verdict for the defendants entered, on the grounds that upon the plaintiff's case a non-suit or verdict for the defendants should have been entered, as the evidence for the plaintiff disclosed the house insured was at the time of the application and insurance encumbered, contrary to the terms of the policy and conditions endorsed thereon, and of the application for insurance; and that it established the defendants' third plea; and that upon the application, policy, and said conditions and pleadings, or record, the plaintiff could not be admitted to set up that the house insured was a chattel and not encumbered. Or why a new trial should not be granted, upon the ground that the verdict for plaintiff was against law and evidence; and for non-direction to the jury, in not telling them that the evidence for the plaintiff established the third plea; and for mis-direction in telling the jury that under the evidence they were entitled to find that the house insured was a chattel and not encumbered; and that the arrangement set up by the plaintiff with his father and brother, as to erecting the said dwelling house, coupled with the plaintiff's alleged intention in building the same, would constitute the same chattel property, and free the same from being incumbered by the mortgages upon the land upon which it was erected, and that they were at liberty to find the same was not encumbered at the time of the application and insurance; or why the verdict should not be reduced to \$58.76, and interest thereon, upon the grounds aforesaid.

May 26, 1881. *J. K. Kerr*, Q.C., shewed cause.

Hardy, Q.C., contra. There were two mortgages on the farm, of which the quarter of an acre on which plaintiff's house was erected formed part; one to Cresswell for \$700; the other to plaintiff's father for \$1,800. The application and policy both describe the insured property as unincumbered. If the house insured was part of the realty, it was encumbered by these two mortgages, and the policy became void under the first "Additional Condition": *Muma v. Niagara District Mutual Ins. Co.*, 22 U. C. R. 214; *Samo v. The Gore District Fire Ins. Co.*, 1 App. R. 545. The plaintiff cannot, in view of the application and policy, in which the dwelling house is treated as realty and insured as such, he permitted to set up that it was a mere chattel and was not affixed to the realty. Both application and policy described it as "by deed." He is estopped: *Sherboneau v. The Beaver Mutual Fire Ins. Co.*, 30 U. C. R. 473, S. C., in Appeal, 33 U. C. R. 1. The declaration too treats it as realty. The alleged verbal understanding between the plaintiff and his father and brother, could not have the effect of releasing the mortgage as to the parcel of land the house stood upon. It could not in any event affect the Cresswell mortgage, as he was no party to the arrangement. The application signed by plaintiff represented the insured property as free from incumbrance, and he cannot by verbal evidence that he told the agent there was "something on it" displace his written representation to the company: *Shannon v. The Gore District Mutual Fire Ins. Co.*, 37 U. C. R. 380. But under the evidence the house was not a chattel: *Bunnell v. Tupper*, 10 U. C. R. 414. *Bald v. Hagar*, 9 C. P. 382; *Alway v. Anderson*, 5 U. C. R. 34; *Holland v. Hodgson*, L. R. 7 C. P. 333; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Longbottom v. Berry*, L. R. 5 Q. B. 123. There is a marked distinction between a dwelling house built for occupation and machinery put up for use in trade or business: *Keefer v. Merrill*, 6 App. R. 121.

November 26, 1881. HAGARTY, C.J.—The decision of this case would be much easier if the only question involved

were, whether this house was or was not a chattel, and intended so to be by the parties interested in the land. As I understand it, the matters submitted to the jury involved this question.

I fear the questions before us are of a wider character.

We may assume that the plaintiff and his father and brother made the verbal arrangement which he swears to, that if they could not pay for the land the house was to be his and he might remove it.

In any view of the case, this plaintiff had an insurable interest in the house and contents. The main difficulty, in my mind, arises from the fact that the insurance was effected on the house, not as a chattel, but as real estate held by deed and free from encumbrance.

The evidence seems clear to me that the defendants considered they were insuring a dwelling house in the ordinary way, as real estate, held by deed and free from encumbrance; and I think the agent also understood it in that light.

I do not understand the plaintiff as stating more than that he told the agent the house was his own and there was nothing against it, though there was something against the land; not that he explained to him that it was his as a chattel which he could move off the land as such.

His representation might be true, and yet nothing have been disclosed to apprise the defendants or their agent of the peculiar interest now asserted in the house. In his proof papers it appears the property is treated also as real estate free from encumbrance.

It seems to me that there is a most material difference in effecting an insurance on a house owned in the ordinary way as realty in fee unincumbered, and a house on heavily mortgaged premises which the assured claims to have the right to remove free from or to avoid the mortgagee's claims.

I think a board of directors deciding on the acceptance or rejection of an application, ought in fairness to understand in which of these two positions the house proposed for insurance stands.

The value of a dwelling house in the ordinary state of unencumbered real estate, and of a building to be removed, (as best the owner can) must be palpably different.

The evidence does not in any way suggest the conclusion that the agent in any way took advantage of plaintiff, or intentionally misrepresented his statements.

In the absence of any such improper dealing, it seems to me that the proposal must speak for itself, as in no way disclosing the interest now asserted, and the policy based thereon equally fails so to do. And in this view I fail to see how the defendants have insured any such interest; on the contrary, they have insured a house as real estate on unencumbered property.

In this view there would be no contract of insurance proved as to the property which the plaintiff now asserts was the subject of insurance.

It might, perhaps, have been better to have raised the defence by a different form of pleading; but the defendants may be allowed to urge that they pleaded to meet, not only the state of facts apparent in the application and in the policy, but also that stated in the declaration, where to any ordinary comprehension the subject matter of insurance is stated to be on "buildings, premises, or property situated on lot 39, &c., and that the same was held by deed subject to no encumbrances."

In the report of the trial, we find that Mr. Hardy, for the defence, urged that if plaintiff held the building as represented (*i. e.* as a chattel), it was a material matter that it should have been represented he did not hold in fee, and asked to put in a plea.

The learned Judge said that the plaintiff made a true representation to the agent, and said that he was owing on the property on the farm. Mr. Hardy urged that he had signed a document and was bound by it, and did not make it known to the company. The learned Judge said that if the evidence supported that, he would allow the plea to be put in, but the evidence was contradictory, and the pleas were sufficient to raise the question if it could be raised.

As already stated, it appears to me that the case was

decided by the jury merely on the question whether the building was or was not a chattel. I find it also apparently stated that the learned Judge said that it made no difference what the defendants thought they were insuring; it depended upon what the fact really was.

This direction does not accord with the view of the law that I have striven to express.

I have taken the case so far in the most favourable aspect for the plaintiff, and without discussing the not very satisfactory state of the law as to whether such an arrangement as the plaintiff has sworn to between himself and his father and brother could avail against a prior mortgagee.

Apart from legal phraseology, and as a matter of ordinary understanding, I cannot understand that a man, claiming as plaintiff claims, could truthfully say, "I hold that house free from all encumbrance," when it would pass to prior mortgagees, unless he went through the sometimes ruinous and always deteriorating process of dragging it off the land to some safer site.

I do not see anything in the case of *Ashford v. Victoria Ins. Co.*, 20 C. P. 434, to help the plaintiff. The insurance there was wholly on chattels in a building.

ARMOUR, J.—In order rightly to determine this case, three things at least are necessary to be understood: first, the purport and effect of the evidence given at the trial; second, the question submitted to the jury and their finding of it; and third, the law applicable to the case.

The purport and effect of the evidence given at the trial, as understood by me, who had what is in some quarters thought to be the disadvantage of hearing it given, is as follows:—The plaintiff and his brother purchased, in November, 1878, from their father, Daniel Phillips, a farm of about forty acres, in the township of Seneca, for the sum of \$2,000. Daniel Phillips had previously mortgaged it to one Cresswell for \$700. The plaintiff and his brother paid to their father \$200 of the \$2,000 down, and gave him a

mortgage for \$1,800 to secure the balance of their purchase money. In the conveyance from Daniel Phillips to the plaintiff and his brother, Daniel Phillips covenanted to pay off the mortgage to Cresswell. At this time there was a house, barn, driving-shed, and small stable on the farm. Shortly after the purchase from Daniel Phillips the plaintiff demised his undivided half of the farm to his brother, who resided in the house upon it and carried on the business of the farm. The plaintiff was a carpenter, and shortly after this he erected, at his own expense, the dwelling-house in question in this suit. There was no cellar under it; it was set on blocks, and the blocks were laid upon the ground, and neither the blocks nor the house were in any manner affixed to or set in the ground, but merely rested upon it by their own weight, nor was the house built to be used with the farm, nor was it so used; and by express stipulation with his father and brother they were to have nothing to do with it, but it was to be his own property, and removable by him at pleasure. Cresswell, however, was not consulted on the subject.

The defendants' agent came to solicit the plaintiff to insure this dwelling-house, and the agent filled up, and the plaintiff signed the application. The plaintiff told the agent that the land upon which the house stood belonged to him and his brother, and that there was a mortgage upon it, but that the house belonged to him alone, and that there was no incumbrance upon it, and the agent admitted in effect that he was so told. Both the mortgage to Cresswell and that to Daniel Phillips were then unpaid.

The learned counsel strenuously urged me to rule that the house was part of the realty, at all events so far as Cresswell was concerned, and insisted that whether it was part of the realty or not was a question of law. I declined to so rule, deeming it to be a mixed question of law and fact and one depending upon the intention of the plaintiff in erecting it. I accordingly left it to the jury to say whether it was the plaintiff's intention in erecting the house that it should form part of the realty, or whether the

contrary was his intention, and directing them that if they found that it was the plaintiff's intention that it should not form part of the realty, they should find for the plaintiff.

The only objection made to my charge was that I should have told the jury as a matter of law that the house was real estate, and that without Cresswell's consent it could not be a chattel.

The jury found for the plaintiff.

In *Culling v. Tuffnell*, per Treby, C. J., at Hereford, 1694, cited in Buller's N. P., page 34, trover was brought for ten loads of timber, and the case was that the defendant had been tenant to the plaintiff and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns in order to carry them away at the end of the term, a verdict was given for the defendant.

In *Elwes v. Maw*, 3 East 38, 2 Sm. L. C. 169, Lord Ellenborough, C. J., referring to the case of *Culling v. Tuffnell*, where Treby, C. J., is stated to have holden that the tenant who had erected a barn upon the premises and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the country take them away at the end of his term, says: "To be sure he might, and that without any custom, for the terms of the statement exclude them from being considered as fixtures; they were not fixed in or to the ground."

In *Rex v. Inhabitants of Londonthorpe*, 6 T. R. 377, a post wind-mill, constructed upon cross traces laid upon brick pillars, but not attached or affixed thereto, was held to be a mere chattel, not being fixed in the ground, and was not a tenement so as to give a settlement.

In *Rex v. Inhabitants of Otley*, 1 B. & Ad. 161, the question was, whether a wind-mill was a tenement by the renting of which the pauper could acquire a settlement in Otley. The mill was of a circular form and of wood, having a foundation of brick twelve inches high from the ground,

in which the woodwork was not inserted, but rested upon it by its own weight alone. Some time after the erection of the mill the tenant placed mortar on the outside and inside of the mill, for the purpose of excluding the weather, mortar so placed not acting as a cement between wood and brickwork. He also fixed posts in the ground, which sloping towards the mill supported steps by which the mill was entered.

Bayley, J., says, "The question is, whether the mill be parcel of a tenement. To be so it must be part and parcel of the freehold. Now, it is not parcel of the freehold unless it be annexed to it, or to something previously connected with it. Here the mill was not affixed to the land but merely rested on a foundation of brick * * The wind-mill in this case would clearly have gone to the executor, and not to the heir."

Parke, J., "To constitute a tenement it is necessary that the structure should be affixed to the soil, or to something annexed to the soil. Here the wind-mill rested merely upon the brick foundation, without being annexed to it by cement."

In *Wansbrough v. Maton*, 4 A. & E. 884, a tenant, after his term had expired, and after a demise by the reversioner to a new tenant, who had entered and was in possession, was held entitled to maintain trover against the reversioner, who interfered to prevent his then entering to remove it, for a barn which consisted of wood resting on but not fastened by mortar or otherwise to caps of blocks of stone fixed into the ground or let into the brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even foundation for the barn to rest upon. Lord Denman C. J., says: "But the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold we cannot say that it is a part of it, and here it is not so united, and therefore not a fixture."

Littledale, J., says: "The barn consists of nothing but the timber, and is not attached to the stone or brickwork."

Perhaps the tenant might not have been entitled to dig into the ground for the purpose of making these foundations, and might be liable in damages for so doing. But having so done he places the barn on the stone caps, not fixing anything to the freehold. Therefore, in removing the barn he does not disturb the freehold."

Patteson, J., "I cannot distinguish this case from *Rex v. Otley*. It was decided there that the wooden mill, resting by its weight on a brick foundation, was not annexed to the freehold. And that was a strong case, for the mill and ground had been demised by the same person to the pauper; yet it was held that the mill did not constitute a part of the tenement, so as to make up the annual value of £10."

Coleridge, J.: "In the absence of exception by custom or in favour of trade the rule is clear. The tenant has no right to remove the whole or any part of what is fixed to the freehold. The question therefore is, what is fixed? That is, in the present case, what does the barn consist of? Does it include the stone caps, or merely the woodwork? I apprehend that the wood work is the whole barn. That wooden barn is supported by mere pressure. And this meets the argument suggested as to the criterion being whether one part of the building be erected with a view to the other."

Huntley v. Russell, 13 Q. B. 572, was an action on the case in the nature of waste against the executors of a rector. The third count was in substance for the pulling down by the vicar of a lean-to cottage and barn on the vicarage premises. This lean-to cottage and barn were erected so as to be capable of being removed, not fixed to the freehold, but resting on the ground or rock, or on bay stones. The learned Judge, Parke, B., told the jury that if they were satisfied that the lean-to and the cottage and barn on the vicarage premises were not fixed to the freehold, they ought to disallow the £5 charged in respect to them. The Court afterwards held that the learned Judge did not misdirect the jury as to the third count, "for build-

ings not fixed to the freehold might certainly be removed." In a note to this case it is said that the lean-to cottage and barn appeared to be of the kind known in that part of the country as "tenant-right" buildings, which the tenant was considered to have a right to remove when erected by him. One of these buildings stood partly upon posts which had sunk not quite a foot into the ground, and it was therefore contended that the building had become affixed to the rectory. Parke, B., said that if the intention of the party erecting these posts was merely to prop up the building, and not to let them into the ground, (as to which there was some evidence, and which question he left to the jury), the sinking described would not, in his opinion, make the building a fixture.

In *Hellawell v. Eastwood*, 6 Ex. 295, the question was, whether certain cotton-spinning machines which were fixed by means of screws, some into the wooden floor, some into lead, which had been poured in a melted state into holes in stones for the purpose of receiving the screws, were by law distrainable for the rent of the mill in which they were fixed.

Parke, B., delivering the judgment of the Court, holding them to be distrainable, says, "The only question, therefore, is, whether the machines when fixed were parcel of the freehold, and this is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causá*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel."

In *Wiltshier v. Cottrell*, 1 E. & B. 674, Coleridge, J., delivered the judgment of the Court, and said the action

was for an injury to the reversionary estate of the plaintiff in premises occupied by a tenant named May, by removing some staddles, a threshing machine, and a granary. There was also a count in trover. The plaintiff had purchased the premises from the devisees in trust of one Thomas Cottrell, deceased, the father of the defendant, who conveyed the same to him by a deed to which the defendant was a party as one of the devisees. The plaintiff demised to May immediately after the conveyance, and the defendant had removed the staddles, threshing machine, and granary from the premises after the demise to May. The defendant had been in the occupation of the premises at the time of the conveyance, and an attempt was made to set up a right to remove by him as outgoing tenant, and some evidence of a custom to remove such articles was given. This claim on the defendant's part appeared to be entirely without foundation. The deed which the defendant had executed as a conveying party conveyed the land and all fixtures, and it appeared that the erections had been put on the land by the defendant's father, who had subsequently become owner in fee, and under whose will the title had come to the defendant. The defendant, therefore, clearly could not set up any right to remove any of the articles as fixtures removable by an agricultural tenant. The land and everything attached to the land passed by the deed, and there was no tenant-right to remove any of the articles in question. The real question in the cause therefore was, whether all or any of the articles in question passed by the conveyance

* * * * *

“The staddles were erections for the purpose of supporting ricks, and were stone pillars mortared to a foundation of bricks and mortar let into the earth, with stone caps mortared on the pillars; and it is clear that such erections would pass under the conveyance, either as part of the land or as fixtures.

The threshing machine was fixed by bolts and screws to posts which were let into the ground, and the machine could

not be got out without disturbing some of the soil, and being so attached to the land would clearly pass under the conveyance. The question as to the granary involves more difficulty. It appeared to be laid on a wooden foundation, supported by staddles, and it lay upon them in the same manner that the ricks lay upon the rick staddles. The part above the stone caps was wood with a tile roof. In removing this granary the caps of the staddles and the upright stones were taken away; but it appeared that it was not attached except by its weight to the staddles, as it was proved that by sufficient power it might have been lifted from the staddles without disturbing them. We think that we are bound by the authorities to consider such an erection as a mere chattel, and neither as part of the land or affixed to the freehold."

The principle to be deduced from these cases is, that where buildings merely rest on and are not fixed in or to the ground, and are not otherwise attached to it except by their own weight, they are mere chattels. But such chattels may become, by the intention of their owner, part of the realty, although not affixed to it, in like manner as what is part of the realty may become, by the intention of its owner, chattels, although not severed from the realty. And this intention is a question of fact to be determined by the jury upon such evidence of that intention as may be brought before them.

Mr. Justice Blackburn, in delivering the judgment of the Exchequer Chamber, in *Holland v. Hodgson*, L. R. 7 C. P. 328, which supports this view, says: "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult if not impossible, to say with precision, what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be

considered a mere chattel: see *Wiltshear v. Cottrell*, and the cases there cited. But even in such a case if the intention be apparent to make the articles part of the land they do become part of the land: see *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382. * * Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

Applying the principles above laid down to the case in hand, it is clear that the dwelling-house in question was a mere chattel, not having become by annexation to the land or by the intention of its owner part of the land.

If there are any cases in our own Courts which conflict with this view, we ought rather to follow *Holland v. Hodgson*, as being the latest exposition of the law, more particularly as our Court of Appeal has followed it and adopted the principles laid down in it in *Keefer v. Merrill*, 6 App. R. 121.

But an examination of the cases in our Courts will shew that they are all distinguishable from the case in hand, and may all be supported on the ground of the intention of the persons who erected the buildings, the subjects of controversy in them, to make such buildings part of the land.

I need do no more than refer to them. They are *Gasco v. Marshall*, 7 U. C. R. 193; *Bunnell v. Tupper*, 10 U. C. R. 414; *Cleaver v. Culloden*, 14 U. C. R. 491; S. C., 15 U. C. R. 582; *Bald v. Hagar*, 9 C. P. 382, and *Sherboneau v. Beaver Mutual Fire Ins. Association*, 30 U. C. R. 472; S. C., 33 U. C. R. 1.

I do not exactly understand the legal principle upon which the defendants seek to avail themselves of Cresswell's

rights as mortgagee with respect to the dwelling house in question ; but it is unnecessary to discuss this, for, if my view of the law be correct, Cresswell had no right whatever to this dwelling house, and could not prevent its removal by the plaintiffs.

The case of *Climie v. Wood*, L. R. 3 Ex. 257, 4 Gr. 328, merely determined that fixtures passed to the mortgagee. This dwelling house was not a fixture.

But it is further urged that the plaintiff insured the dwelling house as part of the land, and the application and policy are referred to as proving this.

He told the defendants' agent that the land on which the house stood belonged to himself and his brother, but that the house belonged to himself alone. This was the exact truth in fact and intention, and, if my view is correct, in law also. This was not insuring the house as part of the land, or representing it to be part of the land, but the contrary.

If there was anything in the application contradictory of this explicit statement made by the plaintiff to the defendants' agent I would hesitate before giving effect to it, because the application was filled up by the agent, and there is no provision in it making him the agent of the applicant ; but there is really nothing contradictory of this statement in it.

The application is designed for the insurance of dwelling houses, barns, sheds, driving houses, of the ordinary contents of each, and of live stock, and of all or any of them ; and the part of it particularly referred to as proving that the plaintiff insured the dwelling house in question as part of the land is the following :

"22. Title.—Held in fee, or how ? In fee."

"23. Encumbered, or not ? If yea, to what amount ? How much land does encumbrance cover, and for what purpose created ? None."

Now it is quite as important for these defendants to know what the title is to, and what the incumbrances are upon, the goods and chattels which these applications of

theirs are designed for the insurance of, as what the title is to, and what the incumbrances are upon the buildings forming part of the land which these same applications are also designed for the insurance of ; and I have not the slightest doubt that the design of these defendants was, that these questions should be answered by the applicant whether he saw fit to insure his goods and chattels only, or the buildings forming part of his land only.

It is true that to the legal mind it is scarcely short of a mortal sin to say that the title to a chattel is a title in fee, but to the ordinary mind it has no such terrors ; and if the plaintiff had by this application insured his horse instead of his house, and had said he held it in fee, every one connected with the defendants' company would have understood that it meant that he was the absolute owner of the horse, and no one would have dreamt that by so answering the question he had converted his horse into real estate and made it part of his land.

If insurance companies will use but one form of application for all the various subjects they are authorized to insure, it would be monstrous to defeat an insured's claim because, owing to the questions asked, the answers were necessarily incongruous in respect of the particular subject he had insured.

The question as to incumbrances would be quite properly answered if the subject matter insured was chattels. In such case that branch of the question, "how much land does incumbrance cover, and for what purpose created?" would require no answer.

I do not think that the application and policy prove what it is urged they prove, and they certainly create no estoppel, the point taken in this rule.

I think the rule should be discharged, with costs.

CAMERON, J.—The plaintiff had unquestionably an insurable interest in the dwelling house at the time of the fire, and if the defence depended upon the issue raised by the third plea the plaintiff's verdict must stand. But the

question is, on the more important and graver contention, was the dwelling house a chattel, and insured as a chattel, and was it unencumbered at the time of the insurance and application therefor, if not a chattel?

Upon the authorities in our own Court referred to in the argument, a dwelling house, such as this was, would be held to be part of the realty, and would pass under a conveyance thereof. In *Bald v. Hagar*, 9 C. P. 382, it was held that a frame house, rested upon posts sunk into the ground, but not in any way attached thereto, is a fixture, and not liable as a chattel to seizure under an execution against goods and chattels. This decision was pronounced after the decision in England of *Wiltshear v. Cottrell*, 1 E. & B. 674, and followed *Bunnell v. Tupper*. 10 U. C. R. 44. Chief Justice Draper, in giving judgment, refers to the considerations laid down by Parke, B. in *Hellawell v. Eastwood*, 6 Ex. 312, for determining whether fixtures so called are parcel of the freehold or not, which is, according to Baron Parke, a question of fact "depending upon the circumstances in each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling—in the language of the civil law, *perpetui usus causâ*, or, in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*." And then the Chief Justice proceeds: "Looking at the facts proved in this case, it is undeniable that the object and purpose of the erection of the house, of its annexation to the soil, such as it was" (the annexation being similar to that in the present case) "was to improve the inheritance. A man purchases a lot of a quarter of an acre of land in a country village; he commences to build a frame house, and is probably unable

in the first place to meet the expense of excavating under it, and building a stone or brick foundation on which to rest this frame. He therefore sinks posts in the earth, lays the frame upon them, and encloses it, and fits it up for a permanent residence. Before it is finished, he goes and lives in it with his family, occupies it in an unfinished state upwards of sixteen months. If there had been a stone foundation, and this wooden frame had been laid upon that, and mortar had been placed on the inside and outside of the sill for the purpose of excluding the weather, that would not, according to the case of *The King v. Otley*, 1 B. & Ad. 161, have made it the less a chattel, mortar so placed not acting as a cement between wood and brick or stone work. But, as has already been remarked, each case must depend on its particular circumstances, and I should not hesitate a moment to hold, notwithstanding the case of *The King v. Otley*, that if there had been such a foundation, the house would have been to all intents and purposes part of the realty, and that there was no legal distinction between the foundation and the superstructure of a dwelling house, however it might be of a windmill; and I confess I feel as little difficulty in arriving at the same conclusion in respect to this house, though standing for the time upon posts let a greater or less depth into the ground. It is notorious, as observed by Burns, J., in *Bunnell v. Tupper*, that in many parts of the Province frame houses are merely rested on blocks of wood, while log houses rest merely by their own weight on the ground; and, as to fences, the country is covered from one end to the other with rails which rest on the ground merely, to protect crops and pasture from cattle. Upon the second consideration enumerated by Parke, B., I think this case may be safely rested."

In the present case, from the evidence of the plaintiff, it must be concluded that he built the house to live in, and for the permanent improvement of the land, unless he failed with his brother to pay for the land. It was only to be a chattel upon a contingency which, at the time of the insurance, had not arisen. The mere intention, however,

with which he erected the house would not, as between him and the mortgagee, Cresswell, disentitle the latter to the benefit of this improvement as increasing his security for the payment of the mortgage debt. If his father, the mortgagor, had put up the house, it clearly would, upon authority, have become bound by the mortgage to Cresswell. What may be chattels as between landlord and tenant, as between mortgagor and mortgagee become part of the realty to secure payment of the debt.

In *Climie v. Wood*, L. R. 3 Ex. 257, affirmed in Appeal, 4 Ex. 328, this principle is clearly established. Kelly, C. B., said, "It is clear that as against a landlord these articles would have been removable by a tenant. But *Climie* was not a tenant: he was a mortgagor in possession, for he had mortgaged one of the pieces of land to Mr. Craig in 1858, and the other to Messrs. Rock in 1865, and this was after the steam engine and boiler had been erected. The question is, therefore, whether, as between mortgagor and mortgagee, trade fixtures are removable by the mortgagor. The term 'fixture' is an ambiguous one. It has been defined to be such an annexation as can be removed from land by the party annexing it adversely to the owner; but in its more general sense it means any annexation or addition which has been affixed to or planted in the soil of the land. The rule of the law is, '*Quicquid plantatur solo, solo cedit*' (*Broom's Maxims*, 295). And in several of the old books '*fixatur*' is used as synonymous with '*plantatur*.' This rule, however, has been relaxed; and whatever the authority may have been for the relaxation, there now exist a variety of authorities binding upon all Courts, prescribing the law as to fixtures between the heir and the executor, between the tenant for life or in tail and the remainder-man, or the reversioner, and between landlord and tenant; and were this case one between landlord and tenant there is no doubt whatever but that the tenant could lawfully remove the steam engine and boiler in question. But, as already said, it is a case between mortgagor and mortgagee, and no authority has been cited to show that a mortgagor is

entitled to remove such trade fixtures. There have been several cases where the Courts have decided that upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterwards annexes a fixture to it, that the fixture shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to shew that trade fixtures may be removed by the mortgagor, but there are several to the contrary ; and unless we are prepared to overrule them our judgment must be adverse to the plaintiff."

This case was followed in *Paterson v. Pyper*, 20 C. P. 278, wherein the Chief Justice of this Court reviewed many of the cases cited upon the argument. Once it is determined the thing, by whatever name called, fixture or trade fixture, is appurtenant to the land, and would pass by a conveyance thereof, the mortgagor cannot remove it to the detriment of the mortgagee. The plaintiff in this case is a mortgagor, but it cannot be said that as against his immediate mortgagee, his father, he would be enjoined in a Court of Equity against removing this house ; and if he could not be so enjoined, it may fairly be held the house was not encumbered by that mortgage. The difficulty is in holding that he is not subject to the mortgage made by his father to Cresswell. He takes the land jointly with his brother subject to that mortgage, and though by the personal covenant of his father the latter and not the plaintiff is bound to pay off the mortgage, it would seem, under the rule of law just stated, the house as well as the rest of the land is subject to the mortgage of Cresswell, and was, in fact, encumbered thereby when the insurance was effected.

It seems, too, impossible, upon the merits, to treat the insurance of this house as the insurance of a chattel.

It is insured as a dwelling house, which is not ordinarily considered to be a chattel, and the answers given by the plaintiff to the questions put in the application shew that he and the agent were dealing with it as part of the realty, and the policy presents it in the same aspect.

The question 22: "Title—Held in fee, or how?" Answer, "In fee"—following questions 19, 20, 21, in reference to the situation and occupation of the premises, shews very plainly that the agent and the plaintiff were dealing with the house as part of the land, and not a separate and distinct thing; and question 23 makes this still more plain: "Is it encumbered or not? If yea, to what amount? *How much land does encumbrance cover*, and for what purpose created?" There is no similarity between this case and *Ashford v. The Victoria Mutual Ins. Co.*, 20 C. P, 434, where, on an insurance of goods without any insurance on buildings, it was held—the question under what title is the property held, the answer, "By deed," had reference to the chattels insured. In that case there was a small encumbrance on the real estate, which the insured told the agent of, and under the circumstances, as many of the questions were totally inapplicable to an insurance upon goods, the answers thereto were of no consequence; and those that could apply were held to have relation to the goods only, in justice to the assured, who had acted in good faith. The evidence of the plaintiff—that he was asked if there was anything against the house, and said no; that he told the agent that the farm was not paid for; that there was a mortgage against the farm and there was nothing against the house, which is explained by his saying he told him he and his brother bought the place, and that they owned it jointly, and he (plaintiff) built the house at his own expense, does not shew that he explained that the house was on part of the farm, and the land on which it was was subject to the mortgage, but the house not. Moreover, he said he said nothing about the mortgage to Cresswell.

But assuming that the plaintiff is not entitled to recover by reason of the encumbrance upon the house, are the defen-

dants at liberty to raise the objection after their resolution authorizing the treasurer to pay the amount due to the plaintiff? The counsel for the plaintiff contends that this was a waiver of any objection to the plaintiff's right, and the defendants were in fact estopped thereby from raising the defence. I see nothing, however, in what took place to prevent the defence being raised. It does not appear that any assessment of the plaintiff himself on his premium note had been made to meet any portion of the loss. He was not called on to make any payment, and is not in a position to say that the passing of the resolution induced him to change his position in any way; and, moreover, it is clear on the evidence the resolution was passed in ignorance of the existence of the encumbrance and their valid ground of defence.

The only remaining question is, is the policy void altogether, or only as to the insurance on the house? *Samo v. The Gore District Mutual Fire Insurance Co.*, 2 S. C. R. 411, is an authority exactly in point against the plaintiff, unless the first condition endorsed on the policy by its terms limits a misrepresentation of the kind in question to affecting the insurance in respect of the matter to which the misrepresentation is directly applicable. The language of the condition is as follows: "If any person or persons shall insure his, her, or their buildings or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made." In *Butler v. The Standard Fire Insurance Co.* 4 App. at page 399, Patterson, J. A., seems to hold the view that only the insurance upon the property in reference to which the misrepresentation is made is invalidated. He says: "Part of this condition covers the same subjects to which the first statutory condition is addressed; but where the latter

invalidates the insurance by reason of such misrepresentations or omissions only as are material to the risk, and invalidates it only in regard to the property to which the misrepresentation or omission relates, this added condition makes every erroneous or untrue statement fatal, although the mistake may be utterly immaterial; and fatal to the entire policy, although it may relate to a small part only of the property insured." The policy is, in express terms, made subject to the conditions endorsed, and when, as in this case, there are two express subjects of insurance, the dwelling house as part of the realty, and the ordinary contents of the house, explained by the ninth added condition to mean usual household effects, such as furniture, wearing apparel, and provisions for household use alone, it is difficult to see on what principle the insurance on the goods can be held void by reason of a misrepresentation as to the title to the house or the encumbrances thereon.

The case of *Samo v. The Gore District Mutual Ins. Co.* was decided by the Supreme Court on the intelligible ground that the contract was entire, and being rendered void by the misrepresentation as to part of the property insured, it was void altogether; and so would this policy be void altogether were it not for the provision that the misrepresentation is to render it void as to the part to which the misrepresentation relates, and thereby excluding its having any effect upon the part insured not covered by the misrepresentation. I fully concede it is all important to an insurance company to know the condition in which the title to house in which goods sought to be insured may be, but it is quite open to it to take a risk on the goods without making enquiries on the subject, or to provide that a misrepresentation as to such title, or anything else in respect of the house, shall not affect the insurance upon the property,

The case of *Butler v. The Standard Fire Insurance Co.*, is also a clear authority, that if the plaintiff had been applying for an insurance on the contents of the house alone, the questions and answers in this case would have

been inapplicable, and the answers would not have constituted such a misrepresentation as would have avoided the insurance under the said first condition ; and this Court is bound thereby. The verdict, therefore, for the plaintiff should stand, but it should be reduced to the sum of \$58.75, the value of the goods.

The case of *Keefer v. Merrill*, decided in the Court of Appeal, 6 App. R. 121, referred to in the argument, has no direct bearing upon the question involved here, but it may be usefully referred to as reviewing the authorities upon the subject of what are fixtures and what not. It would appear that the determination of that question must depend upon the special circumstances of each case.

Rule accordingly.

CRATHERN ET AL. V. BELL.

Guaranty—Advance by guarantor before default.

The defendant guaranteed the due payment by G. to the plaintiffs at maturity of two promissory notes of \$751 each, to the extent of \$751. On the day the first note matured G. was unable to pay it in full, and defendant gave him his note for the requisite amount, which he discounted and applied the proceeds thereof to the payment of the note at a bank where it lay for collection. As between defendant and G. it was intended that the proceeds should go in relief *pro tanto* of defendant's guarantee, but neither the plaintiffs nor the bank had notice of this, and there was no such specific appropriation.

Held, that the advance by defendant to G. before default in payment to the plaintiffs, and therefore before defendant had become liable, was not a payment in satisfaction of plaintiffs' liability by virtue of the guaranty, which remained unaffected thereby.

DECLARATION : For that certain persons doing business under the name, style, and firm of James Glass & Co., were indebted to the plaintiffs in the sum of \$2,253.93, and in consideration that the plaintiffs would accept the promissory notes of the said James Glass, at four, eight, and twelve months, dated the 28th day of April, 1879, for \$751 each, in full satisfaction and discharge of the said claim of the said plaintiffs against the then late firm of the said James Glass & Co., the defendant guaranteed and promised the plaintiffs to be answerable to them to the extent of \$751 for the payment by the said James Glass of the first two of said notes, as they should mature, according to the tenor and effect of said notes respectively: that the plaintiffs did accordingly accept the said promissory notes of the said James Glass, at four, eight and twelve months from the said 28th day of April, for \$751 each, in full satisfaction and discharge of their said claim as aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action; yet the said James Glass did not nor did the defendant pay to the plaintiffs the first two of said promissory notes, although the same were overdue and unpaid, and the second one, to wit, the note above mentioned payable eight months after the date thereof, remained, so overdue and unpaid, and the defendant was

liable thereon to the amount of the said sum of \$751, and interest thereon.

Pleas. The three set out in the report of this case, in 45 U. C. R. 473, which were demurred to, and upon which judgment was given in favour of the plaintiffs; and the fourth added by order of the Judge in Chambers—that the said guarantee set out in the first plea above pleaded was the only guarantee by the defendant to the plaintiffs, and was the one mentioned in the declaration, and no other or different guarantee: that after the making of the said guarantee, and after the delivery of the said notes in the declaration mentioned to the plaintiffs, and before the first of said notes fell due, he the said James Glass, in the said guarantee mentioned, became and was insolvent and unable to pay his debts: that on the maturity of the first of said notes he, the said James Glass, was for the reason aforesaid unable to pay the full amount of the said note, and being so unable, he, the said Glass, on the day the said note was payable, notified the defendant of his inability, and that he could not pay the said note in full, and he, the said Glass on the maturity of the said note, did not pay the same in full: that thereupon he, the defendant, before the commencement of this suit paid to the plaintiffs the sum of \$276, that being the extent to or amount by which said Glass was unable to pay and failed to pay the said note so first falling due as aforesaid, of all which the plaintiffs before the commencement of this suit had notice; and that afterwards, on the maturity of the second of said notes, that is to say, the promissory note due at eight months for \$751, the said James Glass, still being insolvent as aforesaid, failed to pay the same, whereupon the defendant before the commencement of this suit paid the plaintiffs the sum of \$476, being the balance of the said sum of \$751, the extent to which the defendant guaranteed the first two notes in the said guarantee mentioned; and of all this the plaintiffs before the commencement of this suit had notice.

Issue thereon and demurrer thereto.

The issue in fact was ordered to be tried before the issue

in law, and was tried by and before Osler, J., at the last Spring Assizes, at Kingston.

The guarantee, which is set out in 45 U. C. R. 473, was put in and proved, as were also the first two notes mentioned in the guarantee.

The statement of the defendant in writing, with the first of the said two notes annexed to it, was put in by consent as the evidence of the defendant, subject to the objection that nothing which took place between Mr. Bell and Mr. Glass, the principal, in the absence of the plaintiffs, could be evidence, or was admissible against them; the material part of which statement was as follows: "On the day the note annexed hereto fell due, Mr. Glass came to me to say he could not pay it—it is one of the notes mentioned in the guarantee—he said he was short \$275: that he was not going, he believed, to get rid of his difficulties, and that if I paid this it would end my responsibility on my guarantee. I had not the cash, therefore I made my note, I think, payable to the order of Glass: he took the note so made to the bank, and discounted it. It was discounted on the credit of my name, and the proceeds applied in part payment of the note annexed hereto: he paid the balance. I believe all Glass paid on any of the notes was the difference between \$275 and the face of the note annexed hereto. I afterwards paid the \$276, and subsequently before this suit paid Mr. Britton for plaintiffs \$476, which I claimed was all I was liable for to plaintiffs. Glass was unable to pay the note annexed hereto, and had I not made the note as I did, the note annexed hereto would have been dishonoured. The payment was made late in the afternoon of the 1st of September, 1879. Glass was then embarrassed and unable to pay his debts in full: he afterwards was put into insolvency under the Act then in force. I did not go to the bank when the discount was made. I was busy, and Glass did the whole transaction; he afterwards gave me the note. I know nothing of what passed between Glass and the bank agent. I do not know that the plaintiffs knew how the first note was paid; they said they did not."

It was proved that the Bank only held the note referred to in the above statement for collection on account of the plaintiffs.

The learned Judge found and adjudged as follows:—
 “I find that when the first note became due it was held by the Merchants' Bank for collection on account of the plaintiffs: that the defendant, at Glass's request, but without notice to the plaintiffs, gave Glass his promissory note for \$276, in order that he might discount it and apply the proceeds towards payment of the note in question: that Glass discounted the defendant's note at the Merchants Bank, and with the proceeds and with other moneys of his own took up the first note, which he afterwards gave to the defendant. As between the defendant and Glass it was intended that the \$276 should be in relief of the defendant's guarantee to that extent; but neither the plaintiffs nor the Bank had notice of such intention, and the money was in fact applied both by Glass and the plaintiffs in payment of the note. I think that in the absence of any specific appropriation of the proceeds of the defendant's note upon the guarantee, his contention is not tenable. So far as the plaintiffs knew it was Glass's money paid by him in discharge of his contract with them. The question appears to be simply upon what contract was the money applied. If it was applied upon the first note, as I find it was, the guarantee remains available upon the second note. No doubt, if Glass had said to the plaintiffs or the bank, ‘I am only able to pay \$476, and the proceeds of Mr. Bell's note are his money, and intended to be a discharge *pro tanto* of the first note guaranteed by him,’ the plaintiffs would have been bound; but the evidence does not in my view come up to that. I shall not be sorry if the Court can look upon it differently, as it was owing to Mr. Glass's oversight that the money was not applied, as the defendant intended, upon the guaranty. There must, therefore, be a verdict for the plaintiff. As regards the demurrer, which was argued before me yesterday, the defendant is entitled to judgment. The plea

must be read upon demurrer in such a sense as will uphold it, and I read it as securing a payment of \$276 in discharge of the guaranty. Evidence of that fact would be admissible under the allegations and averments contained in it. It is good in substance, but has not been proved. Judgment for the defendant on demurrer. Verdict for the plaintiffs, \$294.16."

In Easter term, *Bethune*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter it for the defendant under the Common Law Procedure Act, on the ground that the plaintiffs were not entitled to recover under the circumstances.

November 29th, 1881. *Britton*, Q. C., shewed cause. The guarantee is an independent contract with the plaintiffs. There was no privity between defendant and Glass. The guarantee is a continuing one: See *DeColyar* on Guarantee, 1, 26, 27; *Ellis v. Emmanuel*, L. R. 1 Ex. D. 157. The first note was paid at maturity; therefore there was no default until maturity of the second note, and if there was no default there was no liability on the part of defendant until maturity of the second note: *DeColyar*, 27; *Brandt* on Suretyship, s. 132. Payment by Glass could be in no sense a payment by the guarantor. Plaintiffs must know—they are entitled to know—that the guarantor is paying, if he is.

Bethune, Q. C., contra. This guarantee must be construed to mean simply that Glass would pay at least \$751: See *Bailies* on Sureties, p. 102. The finding of the Judge was wrong, as the payment was really one by Glass, in satisfaction of his guarantee, to the extent of \$751. The facts are as suggested in the judgment on demurrer, 45 U. C. R. 473.

December 24, 1881. ARMOUR, J.—The guaranty sued upon is a guaranty for the due payment by Glass, at maturity, of the full amount of the first two promissory notes mentioned in it, according to their tenor and effect,

with a limitation, however, upon the defendant's liability in respect thereof, to the amount of \$751.

The defendant could not be made liable in respect of this guaranty until after a default had been made in the payment of the notes. I do not see therefore upon what principle a payment made by him to Glass before such default had occurred, can be held to be a payment in satisfaction of a liability not yet incurred by him.

Glass was in no sense the agent of the plaintiffs to receive satisfaction from the defendant of any liability of the latter to them in respect of such guaranty, nor was he in any way in privity with the defendant in respect of such guaranty. Nor were the Merchants' Bank the agents of the plaintiffs to receive such satisfaction, but they were the agents of the plaintiffs for the purpose merely of collecting Glass's note.

I think it clear that the defendant's liability upon his guaranty remained unaffected by the transaction between him and Glass, and that the rule must be discharged, with costs

HAGARTY, C. J., and CAMERON, J., concurred.

Rule discharged, with costs.

BURKE V. TAYLOR.

Mortgage—Fixtures—Sale of—Burden of proof.

S. mortgaged land upon which was a saw-mill, together with machinery, plant, trade, and other fixtures, to the Dominion Bank. He afterwards erected a drying-kiln with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in all the property mortgaged to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S.

Held, that *prima facie* the piping, being part of a building erected for the purpose of improving the inheritance, was a fixture, and passed to the mortgagees, either under their mortgage or the release; that the burden of showing that it was to continue chattel property, when put into the kiln, lay on the defendant; and that the plaintiff therefore must succeed.

INTERPLEADER issue as to the right of property in certain iron piping, tried at the last Spring Assizes at Toronto, before Wilson, C. J., without a jury. This piping had been attached to a drying-kiln used for drying lumber manufactured at a saw mill of one Silliman and others. On the 18th June, 1873, Silliman and his partner, carrying on business as lumberers, mortgaged a number of lots in the town of Bell Ewart, with a right of way across other lots on which was a switch from the railway to the saw mill on the mortgagor's premises, with the machinery, plant, trade, and other fixtures thereon, to the Dominion Bank, to whom they were largely indebted, and on the 24th November following they made a further mortgage to the bank on the same property.

Silliman went into insolvency, procured his certificate and discharge, and obtained a reconveyance of his estate.

The bank valued their securities at \$62,310, but there remained due to them a large sum, and by deed of 31st December, 1879, reciting the above mortgage, and the discharge, &c., and that the bank had agreed to accept in full of said valuation the lands, limits, a vessel, chattels, and other property on which they had any lien or charge, Silliman and wife sold and conveyed all the land mentioned in the foregoing mortgage, and a large quantity of other lands, lumber limits, &c., absolutely to the bank, with all

machinery, plant, trade, or other fixtures then on said premises.

The drying kiln and piping for heating purposes were erected by the mortgagors after giving the first mortgage.

In December, 1880, the plaintiff Burke applied to the bank to purchase this piping, and was referred by the managers to their solicitor, and on 2nd December, 1880, the latter gave him this receipt:

"Received from D. C. Burke, in cash, \$25, and his note payable to the order of Dominion Bank, being the full purchase money for their interest in dry kiln at Bell Ewart, other than the land," &c.

Plaintiff at once proceeded to the premises then in charge of one Wray for the bank, and removed the piping from the dry kiln, and was about forwarding it by the Northern Railway.

Silliman swore that Mr. Bethune, the bank manager, told him that he might have all the iron about the mill which had been burned down, also this piping. Mr. Bethune said he could not remember having told him he might have the piping, but added that, probably, if he had asked for it, he might have had it.

The learned Chief Justice was of opinion, on the whole evidence, that Silliman was right in asserting that Mr. Bethune had so told him; but he also considered that this was at best a voluntary gift, after the execution of the deed of December, 1879, and that nothing was reserved legally from the operation thereof. He was of opinion that Silliman had not taken possession under the voluntary gift, and that Burke, the purchaser for value, did take actual possession, and perfected the transfer of the property therein to him.

It was after the plaintiff had thus taken possession that Silliman actively intervened, and then made an arrangement with defendant Taylor to sell to him at an agreed price.

Defendant Taylor agreed to purchase with knowledge of plaintiff having taken possession. He declared that he

did not consider himself liable for the costs of this suit, and would only pay if Silliman could legally deliver the piping to him and complete the bargain.

The learned Chief Justice found in favour of the plaintiff.

May 19, 1881. *Bigelow* obtained a rule *nisi* to enter a verdict for the defendant, or for a new trial.

Nov. 22, 1881. *Tilt* shewed cause. The mortgages from Beecher and Silliman to the Dominion Bank, dated 18th June, 1873, and 24th November, 1873, and the assignment from Silliman to Bethune and Austin, trustees for the Dominion Bank, dated 31st December, 1879, conveyed to the bank all this piping, which were fixtures, although they were put up in the dry kiln after the making of the mortgages: *London and Canadian Loan Co. v. Pulford*, 8 P.R. 150; *Keefer v. Merrill*, 6 App. R. 121. Silliman claims the piping by a verbal gift from Mr. Bethune, one of the trustees. Silliman never got possession of the property, and the gift was never perfected. In order to perfect a gift, the property must be delivered to the donee: *Irons v. Smallpiece*, 2 B. & Ald. 551; *Scott v. McAlpine*, 6 C. P. 302. One trustee had no power to make the gift without the consent of his co-trustee. The defendant in his evidence said the piping was not his until Silliman made his title to it good; therefore, having no title, he cannot succeed: *Grant v. Wilson*, 17 U. C. R. 144, and cases there cited.

Bigelow, contra.—Under the deed from Silliman to the bank the dry kiln and pipes did not pass, as the deed only assigns such property as Beecher and Silliman had mortgaged to the bank, and as this dry kiln had not been erected when the mortgages were given, it did not pass by the deed conveying the equity of redemption.

December 24, 1881. HAGARTY, C. J.—I think, on the evidence before us, that the drying kiln and its necessary piping passed to the bank under one or other of the conveyances to them by Silliman. No evidence was offered

by the latter to shew why it did not pass to the mortgagees of the realty, or that there was any agreement or intention to prevent its so passing. Its erection during the currency of the mortgage appears to me to have been clearly for the purpose of improving the inheritance. It was a proper adjunct to the business of dealing in lumber, and for its benefit, and apparently erected as such a wooden building would be ordinarily erected. *Primâ facie*, I consider it as part of the realty as much as the wooden saw mill, of which it was an adjunct, and would pass in a mortgage of property mortgaged as a saw mill property.

The words used in the conveyance of the equity of redemption are clearly wide enough to pass such a property as this piping.

I do not think that in this suit it is for the defendant to ask us to control the plain meaning of the words used by a reference to the recitals, in order, as it were, to reform the instrument, which I do not think requires any reformation. Silliman always acted as if they had passed to the bank by seeking from Mr. Bethune the permission to get the iron about the burnt mill and this piping.

Speaking for myself, I hold, on this evidence, that these pipes, with the drying kiln, under the ordinary rules between mortgagor and mortgagee, passed to the mortgagees.

I think the burden of shewing that they did not pass to the mortgagees, and that they were to continue mere chattels, was wholly on Silliman, and that no such evidence was offered.

It is not a question of tenant's fixtures, as between landlord and tenant, or execution creditors of either party.

I think, on the whole, that the finding for the plaintiff was right in law, and that the rule should be discharged.

CAMERON, J., concurred.

ARMOUR, J.—I agree in the result, because I do not think the evidence sufficiently shows that the Dominion Bank did not, by virtue of their mortgage, become entitled

to hold the property in question as part of the mortgaged premises; that is to say, the evidence did not show that the property in question had never ceased to be chattel property.

Rule discharged.

REGINA V. RICHARDSON.

Criminal law—Assault occasioning actual bodily harm—Evidence—Competency of defendant on his own behalf.

On an indictment for assault and battery occasioning actual bodily harm, *Held*, that the defendant is not a competent witness on his own behalf under 43 Vic. ch. 37, D.

The defendant was indicted at the Court of General Sessions of the Peace, for the County of Wentworth, in June, 1881, "for that he did in and upon one Eliza C. Phillips make an assault, and her, the said Eliza C. Phillips, did then beat, wound, and ill-treat, thereby then occasioning to the said Eliza C. Phillips actual bodily harm, and other wrongs to the said Eliza C. Phillips then did, to the great damage of the said Eliza C. Phillips, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity;" and in his defence upon his trial upon this indictment, the defendant offered himself as a witness on his own behalf, when the learned Chairman ruled that he was not a competent witness, but reserved the question for the consideration of this Court.

Osler, Q. C., for the prisoner. It is admitted that *Regina v. Bonter*, 30 C. P. 19, was well decided under the repealed Act, 41 Vic., ch. 18, D., but it is submitted that 43 Vic., ch. 37, was passed for the very purpose of rendering evidence

admissible in a case of this kind, and it is contended that the effect of the new Act is to render a defendant a competent witness in his own behalf in all cases of assault, unless an indecent assault, where the assault is only a misdemeanour. Where the assault, or assault and battery, amounts to a felony, it is not conceived the defendant would be a competent witness, as the offence then becomes one of an entirely different character. Where, under 32-33 Vic., ch. 20, sec. 43, a charge of assault is laid, and the defendant is upon summary trial acquitted, he cannot afterwards be charged with an assault causing actual bodily harm: *Regina v. Elrington*, 1 B. & S. 687. The occasioning actual bodily harm is merely the result of the battery, and is not a distinct offence. The injury may be a mere abrasure of the skin.

J. G. Scott, Q. C., for the Crown. The recent statute was probably passed with a view to amending the untechnical language of the repealed statute. When there has been a battery, more than an assault has been committed, as an assault is strictly merely an *attempt* with force and violence to do corporal hurt to another; and notwithstanding that "assault" is frequently used alike in the statutes and the decisions to include a battery, yet, as magistrates, in construing the repealed Act, gave the term "Common Assault" used there its strict meaning, the new statute would appear to have been passed to correct this sec. 47 of 32-33 Vic., ch. 20, under which the indictment is laid, and clearly makes a distinction between a common assault (which is here obviously used in the sense of assault and battery) and an assault occasioning actual bodily harm. An assault and battery is a common law offence, an assault occasioning actual bodily harm is created by the statute, and requires a special form of indictment: *Arch. Cr. Pl.* 691. The statutory assaults mentioned in 32-33 Vic., ch. 20, sec. 16, 19, 20 and 36-42, and in 32-33 Vic., ch. 32, sec. 2, though each including a battery, are clearly regarded as something more than assaults and batteries, and have special punishments attached to them. It is to be remem-

bered that if a defendant is competent as a witness, he is also compellable to give evidence against himself, and ambiguous language should not have a construction placed upon it which would work such a complete change in our criminal system, as would be made by the construction now claimed by the defendant.

December 24, 1881. ARMOUR, J.—But for the statute 43 Vic. ch. 37, it is clear that the defendant would not have been a competent witness for the prosecution, or on his own behalf.

That statute provides for the amendment of 32-33 Vic. ch. 20, by adding at the end thereof the following sections.

Section 82: "On the summary or other trial of any person upon any complaint, information or indictment for common assault, or for assault and battery, the defendant shall be a competent witness for the prosecution, or on his own behalf."

Section 83: "On any such trial the wife or husband of the defendant shall be a competent witness on behalf of the defendant."

Section 84: "Where another crime is charged, and the Court having power to try the same is of opinion, at the close of the evidence for the prosecution, that the only case apparently made out is one for common assault, or for assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf, and his wife, or her husband, if the defendant be a woman, shall be a competent witness on behalf of the defendant, in respect of the charge of common assault, or assault and battery."

Section 85: "Except as in the next preceding section mentioned, the next preceding three sections of this Act shall not apply to any prosecution where any other crime than common assault, or assault and battery, is charged in the information or indictment."

It seems to me that what the Legislature intended by these enactments was to make the defendant a witness for the prosecution or on his own behalf only in cases where

the whole offence charged in the information or indictment is one of common assault only, or one of assault and battery only.

The charge in the present indictment is not a charge of assault and battery only, and does not therefore come within the words of the 82nd section, but is a distinct offence, and "another crime" within the words of the 84th and 85th sections.

The crime of assault and battery can be proved without the crime charged in the indictment being proved.

The crime of assault and battery can be proved without its being proved that such assault and battery occasioned actual bodily harm.

The crime charged in this indictment cannot be proved without its being also proved that actual bodily harm was occasioned.

On the present indictment if an assault and battery were proved, but it was not proved that it occasioned actual bodily harm, the person charged might be found guilty of the crime of assault and battery only.

The crime of assault and battery is a common law offence; the crime charged in this indictment is a statutory offence.

The punishment imposable for the crime charged in the indictment is of a different character and degree from that imposable for the crime of assault and battery.

I think, therefore, that the ruling of the learned chairman was right, and that the conviction must be affirmed.

CAMERON, J., concurred.

HAGARTY, C. J., not having been present during the argument, took no part in the judgment.

Conviction affirmed.

IN RE GALERNO AND THE CORPORATION OF THE TOWNSHIP
OF ROCHESTER, AND GRANT V. MCALPINE.*Appeal from Single Court Judge.*

Where a Judge in Single Court had before the Judicature Act decided applications to quash a by-law, and to set-off judgments: *Held*, that under the Act there could be no appeal to a Divisional Court.

Appeals from the judgments in these cases, ante pp. 279, 284.

In the former case *H. J. Scott*, on the 25th November, 1881, appeared for the appeal, and *Aylesworth* contra, and in the latter, on the 6th December, *Holman* for the appeal, and *McCarthy*, Q. C., contra.

The preliminary objection was taken by McCarthy, Q. C., and Aylesworth, in each case, that the Divisional Court had no jurisdiction to hear the appeal, being from a single Judge, but that resort should be had to the Court of Appeal direct, under the Judicature Act, to which it was replied that both decisions had been made before the Judicature Act came into force.

December 24, 1881. HAGARTY, C. J.—These cases are before us as appeals from a Judge presiding in the Single Court.

One is a decision as to the validity of by-laws, the other is on an application for the offset of judgments. In each case our jurisdiction is denied, and it is insisted that these judgments can only be reviewed by the Court of Appeal.

Section 32 and following sections of the Judicature Act, deal with this matter.

Section 37 provides: "Save as aforesaid, and subject to the other provisions of this Act, any rule, order or decision of a Judge in Court may be appealed against to the Court of Appeal."

As to the words "save as aforesaid," we find by section

32, "No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

Section 33. "No appeal shall lie from the judgment or order of any Divisional Court, or Judge of the High Court, to the Court of Appeal," without special leave, under certain amounts.

By section 34, unless there be a difference of opinion in the High Court or a substantial variation on a motion to vary or discharge the decision of a Judge, there shall be no appeal under \$500 exclusive of costs, with certain exceptions.

Section 35 forbids appeals from interlocutory orders to Divisional Courts, whether from Court or Chambers, where relief would not have been previously by the Superior Court.

Section 36. "Save as aforesaid, every rule, order, or decision made by a Judge in Chambers, except orders made in exercise of such discretion as by law belongs to him," are appealable to the Divisional Court; and no appeal to the Court of Appeal unless by special leave.

Then comes section 37 already quoted.

So far as these sections are concerned there appears to be no appeal to a Divisional Court in the cases now before us.

The Judge in each of these cases sat with all the powers of the Court, and except by express words the Divisional Court cannot review his judgment.

It was urged that both these decisions were made before the Judicature Act came into force.

We do not see how this can affect our decision. We must take the appellate machinery as we find it under our existing law.

Under Rule 307, "Where there has been a trial by a jury, any application for a new trial shall be to a Divisional Court."

Where the verdict is that of a Judge, without a jury, it seems to fall under sec. 37, already quoted.

Rule 317—"Where at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong," and (a) "An application under this rule may be to a Divisional Court of the High Court or to the Court of Appeal."

Again, Rule 471 provides for appeals by and to Divisional Courts from orders of a Judge in Chambers and in applications for a new trial in jury trials.

On the whole, we are of opinion that we have no jurisdiction, as a Divisional Court, to review these decisions.

We understand that one of the learned Chancery Judges has decided to the same effect.

ARMOUR and CAMERON, JJ., concurred.

Judgment accordingly.

REGINA V. GRAINGER.

Conviction—Certiorari—Jurisdiction of Superior Court.

On an application to quash a conviction brought upon *certiorari*, the Court will not notice any facts not appearing in the conviction, for the purpose of impeaching it on any ground, except want of jurisdiction; nor has the Court any power to review the decision of the Sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal.

The Court refused, therefore, to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground, among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions.

June 14, 1881. *Hodgins*, Q.C., on behalf of the Attorney-General of Ontario, and upon reading the writ of *certiorari* in this cause, the information, conviction, evidence, finding of the jury, record, and all papers returned with said writ of *certiorari*, obtained a rule in single Court, before Cameron, J., calling upon the Police Magistrate at Belleville, the Judge of the County Court of the County of Hastings and Chairman of the Quarter Sessions, the Junior Judge of the said Court, William Sarsfield, and Michael Joseph Grainger, to shew cause why the conviction of the said Michael Joseph Grainger in this prosecution, and the verdict and order of said Sessions affirming the same, should not be quashed, or why all further proceedings herein should not be stayed, on these grounds:

1. That there was no finding by the jury to warrant the verdict of guilty entered by the Judge, and the learned Judge should have entered a verdict of not guilty on the finding of the jury.

2. That no greater number of licenses had been issued than allowed by the Liquor License Act, and there was therefore no offence for which the defendant could be convicted.

3. That the defendant, being an official acting under the license commissioners, ought not in any event to have been held liable.

4. That the Crown desisted from the further prosecution of the defendant in this case.

This rule came on for argument in the single Court before Osler, J., on the 4th October last, whereupon it was referred to the Full Court for argument, with the following additional grounds, which were added by way of amendment.

1. That the original and amended conviction disclosed no offence, inasmuch as the Liquor License Act did not prescribe any number of tavern licenses to be issued for the City of Belleville, but only provided a method by which a limit could be ascertained; and the conviction did not, but should, show either what that limit was, or how it was ascertained that the proper limit was exceeded by the issuing of twenty-five licenses.

2. Or why, in the alternative, a mandamus should not issue, directed to the said chairman, to enter continuances, &c., and to enter a verdict of not guilty upon the answers of the jury to the questions submitted to them by the chairman on the trial of the appeal, and to make such order as to costs as they might think proper.

The conviction, as amended and confirmed by the Sessions, and returned under the writ of *certiorari*, set out that Michael J. Grainger, of Belleville, on the complaint of William Sarsfield, of the same place, (who was not an Inspector of Licenses nor an officer appointed by the Lieutenant-Governor of the Province of Ontario, or by any License Commissioners,) was convicted before the police magistrate for having, on 3rd July, 1880, at Belleville, being then and there license inspector for the electoral district of the West Riding of Hastings, unlawfully and contrary to the provisions of "the Liquor License Act," knowingly issued a tavern license for the city of Belleville for the year commencing 1st of May, 1880, to one Edwards, in excess of the number of tavern licenses prescribed by said Act for said city of Belleville for said year, the number of tavern licenses prescribed by said Act for said city of Belleville having prior thereto been issued by said inspector, and then being in force. The conviction then adjudged the said Michael T. Grainger to forfeit and pay the said

police magistrate the sum of \$40, to be paid and applied according to law; and if the said sum was not paid within ten days from date, that the sum should be levied by distress and sale of his goods and chattels, and in default of sufficient distress, imprisonment for ten days.

Upon the conviction there was this endorsement: "Court ordered the conviction to be amended in particulars asked for, and confirmed the same with costs.

"C. L. COLEMAN, C. P. C. H."

Dated 4 January, A.D. 1881.

The order of Sessions affirming the conviction was returned, as also the note book of the learned Chairman of Sessions, with this note: "In addition to the general finding I leave three questions to the jury: 1st, did he know that twenty-four was the limit? 2nd, did he issue the license under a *bonâ fide* belief that he had authority to do so? 3rd, did he know that twenty-four had been issued when he issued the twenty-fifth?"

"The jury render a verdict of guilty."

"And answer the questions as follows:

"No. 1. No.

"No. 2. Yes.

"No. 3. Yes."

December 1, 1881. *Dickson*, Q. C., appeared for Sarsfield to shew cause to the rule, and *Dougall*, Q. C., for Grainger, when *Hodgins*, Q. C., for the Attorney-General of Ontario, was called upon to support the rule.

Hodgins, Q. C., for the Crown. The private prosecutor has no *locus standi* against the Crown. All prosecutions are conducted in the name of the Crown, and for the public: *Dickinson's* Quarter Sessions 139. The Attorney-General may at any time take the case out of the hands of the private prosecutor: *Rex v. Inhabitants of Clace*, 4 Burr. 2459. In this case the defendant is an officer of the Crown, and the Crown takes up his defence. The special finding of the jury shews that the defendant committed no offence, and under the Liquor License Act there

was no limit to the number of licenses for the year in question. The conviction does not shew which statutory limit of licenses was exceeded, and is therefore defective: *Fletcher v. Calthorp*, 14 L. J. M. C. 53; *Charter v. Graeme*, 18 L. J. M. C. 73; *Paley on Convictions*, Ed. 6, 210; *Oke's Magisterial Synopsis* 116. The finding of the jury is contradictory, and this Court can review it and order the Sessions to enter a proper judgment: *Dickinson's Quarter Sessions* 572; *Rex v. Woolpit*, 4 A. & E. 205. The evidence is not sufficient to convict, and the Court may quash the conviction on that ground: *Regina v Howorth*, 33 U. C. R. 537; *Paley on Convictions*, Ed. 6. 129.

December 24, 1881. ARMOUR, J.—It seems to be well established that, upon an application to quash a conviction removed into this Court by *certiorari*, the Court will not notice any facts not appearing in the conviction, although returned with it under the *certiorari*, for the purpose of impeaching the conviction on any ground, except only on the ground that the convicting tribunal had no jurisdiction over the subject matter.

It seems also to be equally well established that this Court has no power, upon an application such as the present, to review the decision of the Sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to re-hear an appeal once heard by them.

In the case of *The King v. The Justices of Carnarvon*, 4 B. & Ald. 86, Bayley, J., says: "There is no instance, I believe, which can be found where this Court have interfered by mandamus to direct the Justices to re-hear an appeal which they have once already heard. In this case they entered into the consideration of this appeal, and, after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may have been wrong; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we should consti-

tute this Court a Court of Appeal from the Quarter Sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, although no case has been sent to us for that purpose."

We cannot, I think, look at the notes of the learned Chairman for the purpose of impeaching the conviction.

Looking, however, at the notes of the learned Chairman, the effect of the general finding of guilty by the jury, and of their answers to the questions asked, was clearly a matter for the determination of the Sessions, and their determination thereupon to affirm the conviction we cannot review upon this application.

In considering the question whether the offence of which the defendant was convicted is sufficiently described in the conviction, we have to assume for the purpose of this case that the provisions of the Liquor License Act are all within the powers of the Local Legislature, for Mr. Hodgins, on behalf of the Attorney-General, very properly disclaimed the questioning of such powers.

Now, by the 77th section of that Act, R. S. O. ch. 181, it is provided that, "No conviction * * under this Act, shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction," &c., "that the same was made for an offence against some provision of this Act, within the jurisdiction of the justice, justices, or police magistrate who made or signed the same, and provided there is evidence to prove such offence."

I think it can be readily understood from the present conviction that the same was made for an offence against a provision of the Liquor License Act; and we cannot, therefore, hold it to be insufficient or invalid.

No objection was taken to the jurisdiction of the police magistrate who made it, or to the jurisdiction of the Sessions who affirmed it; and we must assume on this application that there was evidence to prove it.

It would appear from sub-sec. 2 of sec. 77, that we would have no power to quash the present conviction, but this it is unnecessary to determine: *Regina v. Lake*, 7 Pr. Rep. 215.

I think the rule must be discharged, and a *procedendo* issue.

HAGARTY, C. J.—In *Regina v. Strachan*, 20 C. P. 189, I had occasion to examine some of the authorities as to how far the Court could review the facts.

In *Regina v. Bolton*, 1 Q. B. 74, Lord Denman says: "The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature," and cites approvingly an extract from *Brittain v. Kinnaird*, 1 B. & B. 432: "The fallacy lies in assuming that the *fact* which the magistrate has to decide, is that which constitutes his jurisdiction;" and again, Tindal, C. J., in *Cave v. Mountain*, 1 M. & G. 262: "If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation."

Lord Denman adds: "We must not constitute ourselves into a Court of Appeal when the statute does not make us such, because it has constituted no other."

Re Bailey, 3 E. & B. 618, is to the same effect.

In *Hespeler and Shaw*, 16 U. C. R. 104, on *certiorari* to bring up a conviction affirmed at the Sessions, Sir J. Robinson fully recognizes the want of power in the Court to determine whether the jury had before them sufficient evidence of the offence. The conviction was quashed for defects on its face.

If we acceded to the main argument for the defendant, we would be emphatically assuming an appellate jurisdiction not conferred upon us by law. The cases in which the Court has apparently done so are on cases reserved from the Sessions.

CAMERON, J., concurred.

Rule discharged.

GOODALL V. SMITH.

Sale of goods—Contract by letters and telegrams—Condition precedent—Waiver.

By telegrams and letters the defendant offered to sell the plaintiff twelve cars of barley, to be delivered free on the track in Toronto, at sixty-six cents per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Lansdowne. The plaintiff telegraphed, "All right, will take the lot. Ship one car on receipt—quick." By letter of same date the plaintiff said that this might save the necessity of his sending down to inspect, as if this car was all right he need not do so. The car was sent by the defendant, who, however, wrote at once when advising of the shipment, that the only way he would sell would be to have the barley inspected at his grain house. Defendant drew on the plaintiff for the price of the car sent, which was paid. The plaintiff did not inspect, but after receiving this car, the plaintiff wrote and telegraphed to defendant to ship the balance, but defendant refused to do so.

Held, (Cameron, J., diss.) that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect before shipment; and that the shipment of the one car, with the letter accompanying it, was not a waiver of the condition for inspection at Lansdowne of the residue, which the defendant was therefore not bound to deliver.

DECLARATION: That the defendant bargained and sold to the plaintiff, and the plaintiff bought from the defendant twelve car loads of barley, at the price of sixty-three cents per bushel, to be delivered to the plaintiff forthwith, and to be paid for by the plaintiff on delivery; and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to the delivery of the said goods as aforesaid; yet the defendant, although he delivered part of said goods to the plaintiff, did not deliver the remainder thereof, to wit, seven car loads, whereby the plaintiff was deprived of the profits which would have accrued to him from the delivery of the same.

Pleas—1st. That defendant did not bargain and sell to the plaintiff, nor did the plaintiff buy from the defendant the said goods at the price and upon the terms alleged. 2nd. That the plaintiff was not ready and willing to accept the said goods according to the terms of the said contract.

Issue.

The cause was tried before Galt, J., at the last Summer Assizes, at Toronto, by a jury.

The contract alleged in the declaration was supported by the following correspondence between the parties:

Telegram, October 29. Plaintiff to defendant: "Say lowest for 10 cars barley, same as last shipped."

Telegram, October 29. Defendant to plaintiff: "Will give you 10 cars same barley, free on track, Toronto, sixty-six cents—you send man examine barley before sale, if accepted immediately."

Telegram, October 29. Plaintiff to defendant: "Will take 10 cars your price, immediate shipment, equal last two cars."

Letter, October 29. Plaintiff to defendant: "Your first T. D. received; not satisfactory, and wired you for price for ten cars barley same as the last two, as evidently you have not any better. Your reply received—answered would accept your price sixty-six cents on track here; prompt shipment; I don't require to send a man down, as evidently you have this barley, seeing you shipped two cars of it. Our trouble about this other lot is a different thing. You have never sent a car like the sample you sold by yet; say how much of this same barley you can offer. Order cars at once, and push the barley off."

Telegram, October 29. Defendant to plaintiff: "Will only sell you inspect barley at granary in Lansdowne."

Telegram, October 29. Plaintiff to defendant: "Not worth while for 10 cars; make it twenty—you pay expenses if no sale,"

Telegram, October 30. Defendant to plaintiff: "Have only 12 cars; you inspect at your own expense—can have price named."

Telegram, October 30. Plaintiff to defendant: "All right, will take the lot, ship one car on receipt, quick."

Letter, October 30. Plaintiff to defendant: "By our T. & L. have bought twelve cars barley, same sample as last two cars shipped here. Have instructed you to ship one

car here at once. I want to test it before going down, as if it is all right, need not go; we are busy in the west, and would rather you would do your business correctly, and not need watching. Get that car off immediately, and if all right, it will save us going down."

Letter, November 1. Defendant to plaintiff: "With regard to the telegrams and conditions of the ten or twelve cars, you must understand by all the plain telegrams I sent you the barley I have I hold in my granary at Lansdowne, and I cannot make it better or worse than it is; and mind you that the only way I would sell would be to have it inspected at my grain house; and when I received your telegram I sent on the one car as directed, and trust it will turn out satisfactory, and the rest of the barley is about the same—some little better."

Letter, November 2. Plaintiff to defendant: "This car you are sending on is the same as the last two, and fairly represents the twelve car lot, as I understand it. If this car is all right, would like the balance shipped as soon as possible: you can have all ready, and will wire you if this car is right."

Telegram, November 10. Plaintiff to defendant, "This car will do; ship the whole lot on."

Letter November 10. Plaintiff to defendant: "Your car, it appears, was not shipped advise me, and has been here for several days with three days demurrage on it now. I wired you to ship the balance. There is not a great difference from last two cars, but this one is not so good. Expect some of the balance will be better and more worse."

Telegram, November 11. Defendant to plaintiff: "Freights have advanced, and best I can do now is sixty-three cents free on cars at Lansdowne. See letter."

Letter, November 11. Defendant to plaintiff: "I wired you to-day about the barley. Now the best I can do, or will do, is as follows: I will deliver barley free on cars at Lansdowne for sixty-three cents per bushel, and make good large cars, as the rate has gone up to ten cents per

hundred pounds in place of six cents per hundred pounds; and you were so long giving answer, I do not hold bargain so long open, but if you wish I will give you this barley at sixty-three cents, and hold open until three p. m. to-morrow, and if you don't accept by that time will close with another party at very much higher figures. Can load all in two days; will only wait until 3 p.m."

Letter, November 11th. Plaintiff to defendant: "Your T. D. just received. I was not aware that our arrangement about the bargain and sale hinged on freight. It is your own fault in not shipping the trial car promptly. Get the cars ordered and loaded, any way, as I want the barley here now as quickly as possible. Say rate of freight at present and bill for what you load, as G. T. R. cut us the overplus here on barley, any way.

Telegram, November 12th. Defendant to plaintiff: "Will only ship barley for sixty-three cents, free cars—Lansdowne."

Telegram. Plaintiff to defendant: "Do not do anything rash. Have placed barley; must have it shipped immediately as advised."

Telegram, November 13: "I wrote you to ship the barley anyway, and now wish you to do so."

Letter, November 13. Plaintiff to defendant: "Your T. D. received, but very uncalled-for. You had orders to ship the grain. How many orders do you want? You should not ship stuff without marking it advise some one; those cars lay around the track without the G. T. R. knowing who to advise. I trust you have taken care to fill your contract strictly honourable, as in times like these it is liable to lead to unpleasantness, that does no good to either party."

It was admitted that four car loads were shipped on the 15th of November, and that they were paid for at 63c. at Lansdowne.

The learned Judge was of opinion that a contract was not made out, but asked the jury the questions which, with the answers thereto by the jury, were as follow :

If the contract was to be filled at Lansdowne, what amount of damage, the price being 63c. free on board Lansdowne? 9c. per bushel.

If the contract was to be filled at Toronto at 66c., what amount of damages is plaintiff entitled to? Ten cents.

What amount would they estimate the car load to be? 525 bushels.

The verdict was thereupon entered for the defendant, with leave to the plaintiff to move to enter a verdict for him for such sum as the Court might think him entitled to, according to what they should think the contract was.

Nov. 23, 1881. *Falconbridge* obtained an order *nisi* to enter the verdict for the plaintiff for the amount at which the jury at the trial assessed the damages, or for a new trial, on the ground that the letters and telegrams formed a binding contract of sale under the Statute of Frauds.

Clements shewed cause. There is no contract to bind defendant. He always insisted on inspection of the barley. There had been trouble between the parties on a former transaction, and the inspection was for defendant's benefit.

Bethune, Q. C., and Falconbridge, contra. There is a binding contract under the Statute of Frauds. The condition for inspection at Lansdowne was for the plaintiff's benefit, and was one which he could waive. He would then simply be precluded from making any objection to the quality of the barley he might receive. After the acceptance of the trial car, defendant could have insisted on plaintiff taking the barley. The subsequent correspondence may possibly have the effect of reducing the damages to nine cents per bushel, but cannot to any greater extent prejudice the plaintiff.

December 24, 1881. ARMOUR, J.—The plaintiff's claim, as stated by him in his evidence, was in respect of an alleged contract with the defendant for the delivery by the defendant of twelve carloads of barley, free on track at Toronto, for sixty-six cents a bushel.

He contends that such a contract was completed by the telegram from him to the defendant of the 30th of October, and that the stipulation as to inspection at Lansdowne contained in previous telegrams was waived by the defendant shipping the one car in that telegram mentioned, and that at any rate such stipulation was a stipulation for his own benefit, which he was at liberty to waive.

There had been previous sales of barley by the defendant to the plaintiff, and the defendant had, as he alleged, been put to great trouble, loss, and inconvenience by the inspection of it at Toronto.

He therefore determined that he would only sell the barley in question to be inspected at Lansdowne, and he accordingly made that stipulation in the telegrams he sent.

It was under the circumstances a stipulation entirely for his own benefit and in his own interest, and one obviously very important and material for him to make for his proper protection.

The purpose of the plaintiff's instruction to the defendant in the telegram of October 30th, is explained in the letter of the plaintiff to the defendant of the same date. "Have instructed you to ship one car here at once. I want to test it before going down, as if it is all right need not go. Get that car off immediately, and if all right it will save us going down."

The defendant shipped the one car to the plaintiff on November 1, endorsed the bill of lading of it over to the Merchants' Bank, and drew through that bank a sight draft, which he attached to the bill of lading, upon the plaintiff for the price thereof at sixty-six cents.

This draft was apparently accepted by the plaintiff on November 5, and paid by him on November 8.

I do not think that the shipping of this car by the defendant was a waiver by him of the previous stipulation for inspection at Lansdowne as to the residue of the barley, because by his letter to the plaintiff on the same day he shipped the one car, advising the plaintiff of its ship-

ment, he expressly reiterates and declares his intention to insist upon that stipulation.

I think that this stipulation was never waived by the defendant, and that it was never assented to nor performed by the plaintiff, and that the learned Judge was therefore right in the view he expressed at the trial.

The four cars referred to were obviously bought and paid for upon a wholly different contract.

The rule *nisi* must, in my opinion, be discharged, with costs.

HAGARTY, C. J., concurred in the result arrived at, but with some doubt.

CAMERON, J.—I am of opinion that the effect of the several messages sent by the defendant to the plaintiff on the 29th and 30th of October, was a distinct offer in writing on the part of the defendant to sell the plaintiff 12 cars of barley to be delivered free on the track in Toronto, at sixty-six cents per bushel, of the quality of two cars previously shipped by defendant to plaintiff, subject to inspection by the plaintiff at his own expense at the granary in Lansdowne; and the telegram of the plaintiff to defendant of the 30th October, "All right, will take the lot, ship one car on receipt; quick,"—was an unqualified acceptance of the offer, with a request that defendant would ship one car, the object of which was shewn by the letter of the same date from plaintiff to defendant—namely, if satisfactory, it would save the necessity for the plaintiff's sending down to inspect: that this request was not a term added to the proposal, and did not affect the absolute nature of the contract completed by the unqualified acceptance by the plaintiff of the defendant's offer. I think also that the plaintiff's letter of the 30th October did not in effect vary the contract, and if the plaintiff had thereby proposed to do so, it would have had no effect of that kind without the defendant's concurrence. The defendant, by acceding to the request of the plaintiff, to send

forward the one car, shows that he considered the contract closed, subject to the plaintiff's inspection, which was a provision he might waive, and waiving could not have objected to any barley that might have been sent forward by the defendant. I think then there was the contract set out in the declaration established, and the defendant was liable for its breach. I do not think the defendant was at liberty to rescind the contract without notice to the plaintiff that if he did not inspect and accept the barley, he would so rescind the contract. The delay that took place was caused by the defendant, in neglecting to direct the railway company to advise the plaintiff of the arrival of the car load. The plaintiff would, therefore, be strictly entitled to recover upon the basis of the price of the barley delivered in Toronto; but, as I think it may be fairly inferred that he consented to the defendant's shipping the barley at the rate of sixty-three cents a bushel on the cars at Lansdowne, the damages should be assessed on the basis of the latter price.

In *Marshall v. Jamieson*, 42 U. C. R. 115, it was held that the addition of the words, "send directions about shipping," to an acceptance of an offer, did not qualify the contract. The plaintiff telegraphed—"Will take your wheat at 94c. free on board." The defendant replied—"Will accept your offer, 94c.; send directions about shipping." This addition of "send directions about shipping" was quite as important as the plaintiff's request in the present case—"Ship one car on receipt, quick."

In *Murphy v. Thompson*, 28 C. P. 233, the following telegrams constituted a complete contract: "Name lowest for one or two cars hogs; give average." Reply: "Will take \$7.10 here; average 200." Answer: "Will accept your offer \$7.10; order cars, coming to day." In *Marshall v. Jamieson*, it was held it was the duty of the buyer, not the seller, to supply cars. That could hardly be held in this case, as the parties have acted upon the view that the defendant was to furnish the cars; moreover, the delivery was to be in cars on the track at Toronto, and the

barley was at Lansdowne; at all events, the defendant did not put forward that contention at the trial, or at the argument, on the motion to set aside the verdict. The learned Judge at the trial found there was no completed contract, and the question of plaintiff's readiness to perform his part of it did not enter into his reasons for deciding in favour of the defendant. It is clear from the defendant's yielding to the plaintiff's request to send the one car, and drawing for the price, which the plaintiff paid without seeing the barley, it was assumed between them if that car answered the sample, that is to say, the quality of the previous cars, no further inspection would be made, otherwise plaintiff would have to perform his part of the contract and go down to Lansdowne to inspect the barley. To do this a reasonable time would be necessary, and the reasonableness of the time would be measured by the time elapsing after the arrival of the one car load. When that arrived it was satisfactory and plaintiff ordered the balance.

On the whole case, unless it can be held that, even if the plaintiff had gone down and inspected the barley and approved, there would, by reason of what had taken place, have been no sale, it must, I think, be held, as I have above stated, that there was a complete contract, subject to the inspection and approval of the barley by plaintiff. There is no doubt if the plaintiff had replied to the following telegram of the defendant,—“Will give you ten cars same barley free on track, Toronto, sixty-six cents: you send man to examine barley *before sale*,” as he did to the one offering the 12 cars, “all right, will take lot,”—the words, “before sale,” would shew it was not intended there should be a contract until after the inspection, when the binding bargain would still have had to have been entered into. But when the plaintiff replied, “not worth while for ten cars, make it twenty, you pay expenses if no sale,” and the defendant answered to that, “Have only twelve cars, you inspect at your own expense, can have, price named”—there became a present sale of the twelve cars when the

plaintiff accepted it by his answer, "All right, will take the lot." Reverse the case. Suppose the plaintiff the next day had telegraphed, "Won't go down and inspect, and won't take barley," would he not be liable to the defendant for any loss he might have sustained, as, for instance, barley had fallen ten cents a bushel? If the bargain was binding on one it was also binding on the other, and I have little doubt if the plaintiff had refused to perform the contract he would have been held justly responsible.

The case is not free from doubt, and I need hardly say, when my learned brothers take a different view, as did also the learned Judge at the trial, my resolution of it in favour of the plaintiff is made with very serious doubts of the soundness of the conclusion reached; but it does seem to me it was the clear intention of the parties that the one should sell, and the other buy the positive quantity of twelve car loads, subject to the option of the plaintiff to reject the barley if it did not, in his judgment, answer the quality of the two former cars, in which case the bargain should be at an end, and no damages should be recovered against the defendant by reason of his having sold the barley as coming up to the standard it did not reach, and the plaintiff was to bear the expense of satisfying himself as to that. I think it cannot be contended for a moment that the defendant did not by his offer intend that the plaintiff should have the barley if he wished to, and he was not reserving to himself the right to say to the plaintiff after he had incurred the expense of inspection and had approved of the barley, you shall not have it. It is, therefore, both more reasonable and just to hold there was a completed bargain, with the option to the plaintiff to approve or disapprove of the barley, than to hold there was no bargain at all, but merely unclosed propositions and offers amounting to nothing.

Rule discharged, with costs.

COWAN V. DOOLITTLE.

Promissory note—Principal and surety—Payment by surety—Rights of surety.

The M. manufacturing company, in the usual course of their business, took from their agents notes for machines supplied to them, which were transferred by the M. company as collateral security to a bank where they had a line of credit. The agreement with the agents was that, upon their substituting their customers' notes for their own, they were entitled to delivery up of the latter. The defendant, who was the agent, had given notes for machines supplied him, which were handed to the bank by the company. He afterwards transferred to the company a large number of his customers' notes. The bank manager, finding some of the defendant's notes overdue, demanded that they should be replaced by fresh paper, and the company then applied to the defendant, who gave the notes sued on without getting an adjustment of accounts between them, though there was but a small balance due to the company; and these notes were transferred to the bank, and the old notes given up. The M. company got into difficulties, and the bank sued B., their president, and another who, jointly with the M. company, had guaranteed the company's account to the extent of \$50,000. B., in order to protect himself, resigned the presidency, and undertook to pay off the company's indebtedness to the bank, and take all their securities. A resolution of the board was passed approving of this, and the M. company directed the bank to transfer to B. the company's securities on payment. B. applied to the plaintiff for the money, and he advanced the requisite amount, having obtained the same by pledging stock and other securities to a loan company, and took all the notes held by the bank to hold for collection to pay expenses, repay the advances, pay their indebtedness to the loan company, and to account to B. The notes sued on were among those transferred to the plaintiff, who took them without notice of their character, or the state of the account between the defendant and the M. company.

Held, that he stood in the place of the bank, and succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands.

THE plaintiff sued as endorsee of two promissory notes, made by the defendant, bearing date the 9th March, 1880, each for the sum of \$1,625, payable on the 1st October, 1880, and 1st January, 1881, respectively, to the order of the Masson Manufacturing Company, and endorsed by that company to the plaintiff.

The defendant pleaded a number of pleas, the defence being in substance that defendant had satisfied all claims of the Masson Company, the payees of the notes, and that they could not have recovered anything against him thereon, and that the plaintiff stood in no better position than such payees: that the notes were given by the defendant for

the accommodation of the Masson Company, and that defendant never received any value therefor: that the Masson Company paid and satisfied the holders of said notes at maturity, and that the same were subsequently transferred to the plaintiff overdue.

Issue.

The case was tried before Galt, J., at the last Spring Assizes at Whitby.

It appeared at the trial that the defendant had ordered from the Masson Manufacturing Company a number of agricultural implements, which in the aggregate amounted to a large sum in excess of the two notes sued on, for which the defendant had given to the company his notes, payable at certain agreed dates. Part of the arrangement between the company and the defendant was, that the company would take the defendant's customers' notes at the usual terms of payment, not exceeding 18 months, to bear interest at seven per cent., and the collection of each note to be guaranteed by the defendant by bond or otherwise, and when a sufficient number of customers' notes were received to cover the amount of defendant's note first coming due, the latter would be given up, and so on till all his notes were taken up.

The Masson Manufacturing Company had an arrangement with the Dominion Bank, by which they discounted the company's notes, taking the company's customers' notes as collateral, the bank at the same time holding a guarantee under the seal of the company, and under the hands and seals of six persons, among whom William Bowman, the President of the company, was one, jointly and severally guaranteeing to the bank repayment of all advances made, or to be made, to the company by the discount of their paper or otherwise, to the extent of \$50,000. The said guarantee bore date the 16th day of February, 1876.

After the defendant had given his notes on account of the purchase of implements, the Manufacturing Company handed over to the bank the defendant's notes. After this

the defendant turned into the company a large number of his customers' notes; and in March, 1880, the agent of the bank at Oshawa, finding some of the defendant's notes then held by the bank over due, required that they should be replaced by new and unmatured notes; whereupon the manager of the Manufacturing Company applied to the defendant for fresh paper; and without having a final settlement or adjustment of the accounts between him and the company, he gave to the company the two notes sued on, to be handed to the bank, which was done, and the bank gave up the defendant's notes they then held.

Afterwards, in November, 1880, the company having become embarrassed, and an execution having been placed in the hands of the sheriff of the county of Ontario against it, passed a resolution at a meeting of the shareholders, held on the 24th November, 1880, "that the account with the Dominion Bank be now closed; that William Bowman, one of the sureties of the company to the Dominion Bank, having offered to pay to the bank the total amount of the indebtedness of the company to the bank, and to take over all the securities held by the bank, this meeting assents thereto, and directs that the said securities be delivered to the said William Bowman, upon payment as aforesaid; and that the Dominion Bank upon such payment do deliver to the said Bowman all such securities, and do assign to him all bonds and other securities, the said Bowman to apply the said securities in payment of said indebtedness to the bank, so to be assumed by him, and of the indebtedness of the company to him, and to account for the surplus, if any, to the said company."

On the 26th November, 1880 (two days after) Bowman & Cowan executed an agreement reciting that Bowman, having applied to the Ontario Loan Company for a loan of a large sum and offered in security certain mortgages and promissory notes, and that the Company declined advances on notes and required other security, &c.; and that Cowan, being a stock-holder, and certain other stock-holders, had pledged their stock to the company as security for the loan

to Bowman, and Bowman had agreed to deliver to Cowan said notes to hold as trustee for himself and the other pledgees of the stock; it was agreed that Cowan should take from Bowman said notes, particularly certain notes then in Mr. English's hands, "and also all the notes belonging to the Masson Manufacturing Company now held by the Dominion Bank, said to amount to \$200,000," and certain other notes; Cowan to get in the notes as they matured and apply the proceeds in payment of the costs of collection, and then in payment of all moneys for which said stocks were or might be pledged to the loan company; and then in payment of all other indebtedness of Bowman to the loan company; and after payment thereof, then to account to Bowman for all notes uncollected, and for all balances remaining in Cowan's hands, proceeds of such collections; Bowman not to be entitled to demand or receive from Cowan any of the notes or proceeds thereof until all the moneys for which said stocks might be pledged, and all debt of Bowman to the company should be fully satisfied.

It also appeared that in pursuance of the said resolution the securities held by the bank were handed over to Lyman English, as solicitor for the said Bowman: that the plaintiff and others, for whom he was acting, provided the money with which Bowman paid the bank, and the plaintiff received from Bowman or his solicitor, English, all the securities held by the bank, and got some additional securities on real estate.

Charles W. Scott, accountant of the company, proved the giving of the notes by the defendant to the company, and their endorsement to the bank by the company. In cross-examination he said, in answer to the question, "Were the notes accommodation notes?" "When they were given I understood Mr. Doolittle owed us from \$2000 to \$3000: that four notes were given for \$6,500 or \$1,625 each." To the question, "The notes were not given to represent the debt or anything that was supposed to be a debt?" he said, "The balance was for accommodation I suppose: the

amount had never been settled with Doolittle. He had been an agent for the sale of machines since the beginning of the company. He was not selling on commission; he bought the machines. He was working under an agency contract." * * [The first agreement between the company and Mr. Doolittle, dated 28 June, 1875, was put in.] "That is the only contract he was acting under as an agent. An order was given for the season of 1876; that order was closed up. There was an order given in 1876 for 1877. The original notes for 1876 and 1877 were given upon the same terms as mentioned in the agreement. Exhibit 4 is the order given for the season of 1877 under the contract. It is dated August 3, 1876. Under that order and agreement four notes were given to the company. The notes were for \$1,625 each, being the amount of the 100 machines that Mr. Doolittle got: each machine was \$65. These notes were given on 7th March, 1877. The notes were put in the Dominion Bank to raise money. The company's notes were discounted and they were put there as collateral. These notes were not discounted. During 1877 sales were made by Doolittle; we received from him remittances and customers' notes under the agreement. At the end of 1877 there was a balance struck. I think there was a balance of \$300 in Mr. Doolittle's favour. There were some machines on hand, and fetched down into the next year; at the end of 1877 the balance was in his favour; we allowed him the following year to account for the machines. These machines were accounted for the next year. Doolittle got machines at the wholesale price during 1878 and 1879; but he did not give notes in advance, nor did he give a contract order. There was no agency contract about whatever he bought in 1878 and 1879. There was a balance of \$1,500, which Mr. Doolittle owed the company on 9th March, 1880, when these notes in question were given. He was charged with all the machines he got. In arriving at that balance he was charged with about \$1200 worth of bad customers' paper; so if the paper was not charged against him, the balance would only be about

\$300. Since that time he has accounted to us for customers' paper. I wrote the notes in question out; the arrangement about getting the notes was made by Mr. Mason; since these notes were given Mr. Doolittle has got more machines; he has got more since March, 1880, and he has made payments; the balance, as it now stands, shews \$28.43 against Mr. Doolittle—that includes giving notes for the notes in question * * According to our account, Mr. Doolittle has paid the company for these notes with the exception of \$28.42. I understood these notes were given partly for accommodation. When I got these notes I went to the bank and took out the old ones and sent them to Mr. Doolittle. I took out the four old ones which had been given under the contract of 1877. When I did that the Dominion Bank did not know from me at the time this was accommodation paper. I told the manager after that part of these notes were paid. I said our intentions were, as soon as we got the farmers' notes, we were to get these notes out. I am not certain the bank knew the old notes were accommodation paper. In October we retired one of the other two notes to Mr. Doolittle. We retired it from the bank. The other is in the Ontario Loan and Savings Company's possession. It was only due the first of the month. The loan company hold all these notes for collection. I was in the bank when Mr. English got out some notes. The cheque was for the actual debt of the company to the bank. The amount of the debt in the bank at that time was \$84,000 and \$70,000—altogether \$154,000. There was more than \$154,000 worth of notes discounted. There was a balance of \$30,000 standing to the company. For the whole \$154,000 there was in the bank about \$200,000 of collateral notes. Of that Mr. Doolittle's notes formed part, and there were some other agent's notes. I don't know whether Mr. Cowan or Mr. Bowman knew some of this paper was accommodation."

Mr. F. Cowan: "The loan company made the advance on which the notes were taken out of the bank to me and others. An application was made to myself and the

secretary of the company by the solicitor of the company on behalf of Mr. Bowman. That was entertained only so far. We told Mr. English that we could not advance but on real estate security or on stock loans. The loan company advanced money to me and others on securities we gave them. The company is not the holders of these notes: they have no claim on these notes. I have the notes. The third note is in the loan company's hands for collection, subject to my order at any moment. They don't hold them as collateral security. I and the other gentlemen borrowed a portion of the money advanced to Mr. Bowman. Some of the money was my own. The loan company have charged me eight per cent. I and others borrowed it from the loan company at eight per cent., and we are lending it to Mr. Bowman at the same rate. We have a right to a commission beyond what is paid the company for interest. The commission is not yet defined. It will not be defined till we see what trouble there will be in the collection. Mr. Bowman asked for the loan. Mr. Bowman has been for years president of this company. I think Mr. Bowman knew very little about the character of the paper. I didn't know any was accommodation. I didn't know it until I heard it in the Court. I saw Mr. Doolittle: I told him I was sorry for him, and I am now. I told him that I had no direct interest, that I could not lose any money by it. When the debt was taken over there was a margin of \$47,000 from the bank. Whatever may be the result of the suit we are amply secured. I have always understood that a portion of the paper was agent's paper. I knew their mode of dealing with the agent's paper was always subject to the adjustment of the account. I have talked with Mr. Masson before taking these notes over as regards the quality of the paper in the bank, and as to the extent it was collectable. I didn't understand from him anything in reference to some agent's paper they thought was not collectable. He didn't speak to me in reference to Mr. Doolittle. He didn't speak to me with reference to Mr. Harper's paper. I don't know anything

about the amount of agent's paper that was in the bank. I took a good deal of interest in it. I saw Mr. Mason a good many times about the matter. I have collected a considerable sum, about \$75,000 in all. That sum is at my credit, as a deposit in the Ontario Loan Company's Office. I have not applied any part of it in reduction of the money I have advanced—not till it is completed. I gave Mr. Doolittle to understand that I sympathized with him, and that his ultimate loss would be nothing, I thought, because the company had turned out very well. The Masson Company are in liquidation. I understood the agent's notes were originally given for value. I didn't know they were using their agents' names for accommodation till I came into Court. There was a memorandum on the back of agent's note, that it was payable in farmers' notes. I know nothing about these notes in question whatever. We advanced our \$101,000, and took up these notes. We took up all the security. Mr. Bowman handed over to the company as security hypothecated mortgages to the amount of \$30,000 or \$40,000, also these notes and some \$28,000 of other notes. The company declined to advance on the security of the notes. After that Mr. Bowman made an application for a loan on real estate security. The company made that advance: no advance was made to Bowman by the company. I and others of the company pledged our stock, and loaned the money to Bowman. There was an agreement drawn up between Bowman and us at the time—agreement put in. It was not a loan of the company's cheques that was given to the Dominion Bank. It was my cheque."

For the defence.—George A. Masson swore: "I am the general manager of the manufacturing company. I remember the notes made by Mr. Doolittle. They were deposited in the bank as collateral security. In March, 1880, new notes were handed in. The first batch of notes had been left in the bank, and our collateral margin was not any larger than it ought to be; and through carelessness it had to be taken out, and the manager of the bank made some enquiry. I told him these notes had been partly

settled, and I didn't know but that the whole amount had been turned in. I did not have an immediate eye over the books. * * The manager talked about them being so long over due. I got renewals of these notes from Mr. Doolittle until the account would be adjusted between the company and him. Before I got them, I told Mr. Holland that was the way in which the old paper stood. I don't know as anything was said about renewals to Mr. Holland. I gave him to understand it was renewals, and the renewals were taken to the account that he had adjusted. After that one of the notes was retired. The two notes in this suit and the third note has not been retired. Some difficulty arose with the Masson Manufacturing Company in 1880. I know of the arrangement that was made, that the account should be taken over from the Dominion Bank. During the difficulty we reached November, 1880. There was an arrangement entered into by which a settlement was to be effected and was effected. I transferred \$25,000 of my stock to Mr. Cowan, and I understood that Mr. ———, transferred \$12,500 of his stock in trust to Mr. McMillan, Secretary of the Loan Company, and I resigned my position as managing director, and Mr. ——— resigned his position as director. Afterwards a new board was formed for the Masson Company. The first meeting of the new board was on the 24th November, 1880. They accepted my resignation: they reinstated me as general manager. * * A resolution was passed on the 27th November. Mr. English, as solicitor for Mr. Bowman, came into the Dominion Bank with a marked cheque, I was in the bank at the time, and took up this account. and paid the amount of the Masson Company's difficulties. He took away some notes. I don't know if he took all. He took a portion at any rate. I am not positive whether the whole was then paid or subsequently. I think he took them away from the bank at two different times. Prior to this there was a good deal of talk about the way in which this could be done. I was frequently referred to by persons regarding the position in which matters and

papers stood. The conversation was mostly between Mr. Cowan and myself. Of course, before the paper was taken over, it was talked of as agents' notes. We did not use the word 'accommodation.' There was something said in reference to Doolittle's paper. It was said a portion of Mr. Doolittle's were already paid, and some others were also mentioned. This was a conversation between Mr. Cowan and myself before the paper was taken up by Mr. English. I told Mr. Cowan a portion of these notes had been settled, that the account was not adjusted. I told him I could not say how much there might be coming upon them. I always said in any conversation I had with him, that between agents' notes that had been paid in and not settled, and really bad notes in our account, there would be \$20,000 not recoverable. Special mention was made of Mr. Doolittle's notes and Mr. Harper's. It was always in my mind that these notes were unsettled. We always considered the *bonâ fide* margin was ample to cover all the debts. Question: "Was the transaction consummated with the Dominion Bank done in consequence of a resolution of the directors?" "The only answer that I can give was, that the resolution was passed on the 24th, and the account was taken over on the 27th. The resolution was to the effect that Mr. Bowman could take up the account out of the Dominion Bank and out of the Standard Bank. I mean that he was to pay the amount of indebtedness to the bank, and take up from the bank the collaterals belonging to the company."

On cross-examination he said:—"The notes given in March, 1877, were settled by purchasers' notes. These same notes were left in the bank until March, 1880. Mr. Holland spoke to me frequently about the notes being over due. He wanted to know how they had remained there so long after they were due. He insisted upon them being paid or adjusted. He wanted to get something for them. We had a specified margin at the bank. If the \$4,000 had been taken out the margin might or might not have been in existence: our margin was getting pretty low. Providing these notes had been taken out the margin would have

been lower than the bank requires. The bank was not pressing. Mr. Holland simply asked me how they were over due, and I told him. He hadn't spoken to me about the notes until after the December settlement in 1877. I told him that Doolittle was not owing the full amount, but that he was owing something, and the account was not adjusted, and when we knew the proper amount he did owe it would be arranged. Doolittle didn't press me to get the notes back. I don't think Doolittle spoke to me about it until the first talk of trouble. For some time after this settlement in December, 1877, I didn't as a matter of fact know they were there. I never paid anything to the bank on them. At the time the original notes were given the full amount was due on them. When the bank got them they got them as they got other agents' notes. They understood on what terms agents' notes were given. They knew they were subject, from time to time, to the adjusting of the accounts. There was an arrangement with the bank so far as agents' notes were concerned. The agents' notes were to be replaced with customers' notes. If the margin of the bank required it, they were to get the full amount of the agents' notes in farmers' notes. They understood that the agents' accounts were adjusted from time to time, and even though agents' notes were there, they were not always for the full amount, because they might have turned in notes that would have applied on their own paper. We were to give purchasers' notes to release the agents' notes. I don't know as Doolittle ever handed me individually a note. I think he turned into the company; but I don't know if that bank got any. He paid the Masson company the amount of his account: part of it after he gave these notes. I don't know how much he paid after he gave the notes. He paid for all the machines he got. I can't say the exact amounts he paid after these notes were given. I know cash or notes were turned in by Doolittle, after these notes were given, to be applied on his indebtedness to the company. I can't tell the exact amount that was so turned in, because I don't

keep it in detail. I heard Mr. Scott's evidence, which is correct. I suppose Mr. Scott attends to the bank business. I had a conversation with Mr. Cowan : that was after these last notes of Mr. Doolittle were given. We might have had a conversation about the amount before that. When Doolittle came into our place, I asked him for the notes for \$6,500. I don't remember the conversation I had with him at that time. I remember the conversation I had with Mr. Holland, and I have very good reason for recollecting that with Mr. Holland. I had to attend to the adjusting of the margin, and the security that was behind, to get money to run the business. In the other case when Mr. Doolittle came there I told him the position of these notes, and told him to give us new notes till his accounts were adjusted. Any particular conversation that would be about it I don't remember. I believe Mr. Doolittle at that time knew he didn't owe us \$6,500. I don't think he told me he didn't owe me anything. I asked him to give these notes till his account might be settled. I didn't tell him I wanted to pay this into the bank as security to them. I wanted them as renewals to the old notes, which were past due. He understood these notes were going into the bank. I don't know that he knew our margin was below what it should be. I was to leave them until I got other notes to make the margin higher. I might have said, when I asked him for these notes, that I could not possibly run the business without capital. I have no recollection I asked him to give these notes for my accommodation. He didn't suppose he owed that amount. When I got these notes I gave them to Mr. Scott. I don't remember what were the conversations passed between Doolittle and me. I don't know if he objected to sign the notes or not. There was no sale of machines made at that time. These notes were entirely on account of the other notes. They were purely accommodation. I don't know how much he was indebted at the time he gave the notes. He might have owed \$3,000. I think he got the old notes at that time. I don't know as I can fix the date of the conversation with

Mr. Cowan. It would be along in November some time. I had a good many conversations with him. The notes were taken up after the resolution was passed by the directors. Bowman was to assume the bank's position, I suppose. I understood he paid the money, and that he was to stand in their shoes."

William H. Holland: "I am manager of the Dominion Bank at Oshawa. The Masson account was closed in December last. The first part was closed on 27th November. It was closed by cheques handed to me by Mr. English. The amount of the Masson Company's debt was paid. One portion of the amount was settled on the 27th November, and the other on the 2nd December. I was instructed by the company to accept the amount from Mr. Bowman, and hand him over any collaterals I had. I received a cheque from Mr. English acting as attorney for Mr. Bowman. I took his receipt; he produced a copy of the resolution a day or two afterwards. It was solely in consequence of that resolution. I had no wish to close the account. Among the notes we held were some notes of Mr. Doolittle's. They were renewal of old notes * * I knew these notes were agents' notes. With agents' notes I knew they were in the habit of redeeming them by farmers' paper. At any time we were glad to redeem an agent's note by placing farmer's paper in its place. There was no conversation about Doolittle's paper, when at the time this last paper was taken. I have said at different times, 'Why don't you get this paper out of the way,' and I have asked him if Doolittle owed him this amount. He said he did not know, but he would get the account adjusted. I took the paper as renewal, to have it fresher. After I parted with these notes of Doolittle's the bank did not sell them to Mr. Bowman or Cowan. I did not make any sale of the estates."

On cross-examination he said: "I had no desire to close the account. I had sued the manufacturing company and recovered a judgment for \$100,000. That judgment was put in the sheriff's hands. The object was to prevent other

parties getting in advance. We were not going to allow other people to close up the company. It was after this judgment Bowman took up the account. I suppose I was transferring the account to Mr. Bowman. I didn't know Mr. Bowman was taking the bank's position. I heard Mr. Bowman was advancing the money. I expected he was holding these as security. These notes had been overdue sometime, and I demanded they should be attended to in some way. I wanted them replaced. If Masson had told me that Doolittle owed nothing I would not have given up these notes. I would have wanted money, or farmers' paper, or something I considered equally good. There was no understanding between me and Masson that the notes were to be subject to the adjustment of the agents' accounts. I would not have given up the agents' notes without getting value of some kind, providing the margin was not made up some other way. If these notes were taken up it would have reduced the margin by that amount. I never received from Mr. Masson cash or farmers' notes in payment. These notes were unpaid, and we held Doolittle for the full amount at the time they were transferred to Bowman. I don't know that Mr. Masson's conversations referred specially to Mr. Masson's (? Doolittle's) notes. I told him to reduce his agents' notes generally, and get more farmers' paper. He understood he could not get these notes out unless he kept up his margin. The only paper discounted for the Masson company was their own paper. The margin for security was a 25 per cent margin. We certainly preferred to have farmers' notes in place of the agents' notes. The Masson company had at any time the right of taking up any of these collateral papers on making good their margin."

The learned Judge found that the defendant had paid to the company the amount of the notes, except \$28.42: that the plaintiff and Bowman were so mixed up together that the plaintiff was affected by notice to Bowman of the nature of the dealings between the defendant and the company; and directed that judgment should be entered for the defendant, with costs.

May 31, 1881.—*Ritchie* obtained a rule, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, as well upon the evidence as upon affidavits filed.

November 1, 1881, *J. K. Kerr*, Q. C., and *Holman*, shewed cause. Bowman was president of the Masson Manufacturing Company from its inception, until a few days before the payment to the Dominion Bank of the indebtedness of the company. As appears from the resolution of the company, Bowman paid off the bank for the company. He was up till then president, was still a large stockholder, and was in effect the company, in making the payment. As president, he had knowledge of the dealings of the company with agents' notes, and that they were given for accommodation. The plaintiff Cowan is a trustee for Bowman and the other members of the syndicate, and the evidence shews that the plaintiff had notice of the position of these notes. Bowman was surety to the bank under his bond, and as surety, having paid off the debt, could only be in the same position as the company with regard to the notes; and as the company could not sue the defendant, he could not. At best the plaintiff would be entitled to look to the defendant only as co-surety in proportion to the amounts to which they were respectively liable; but when one surety pays off the debt, it is satisfied except so far as the rights of the surety are reserved by R. S. O. ch. 108, secs. 2, 3, 4. But under that statute the defendant cannot be held liable, as he is not the principal debtor, co-surety, co-contractor, or co-debtor.

Ritchie, contra. The finding of the learned Judge that Bowman had a personal knowledge of the state of accounts between the defendant and the Masson Manufacturing Company, and of the dealings between them, is not supported by the evidence; but even if he had such knowledge, it cannot affect the plaintiff's right, as transferee of the Dominion Bank, to recover in this action. The evidence shews that the notes in question were given

by defendant to the Masson Company to replace his notes then held by the Dominion Bank, and that such original notes so held by the bank had been given by defendant to the Masson Company for a valuable consideration, and had been endorsed before maturity by that company to the bank as security for cash advances. Immediately after the notes in question were made by defendant, they were endorsed by the company to the bank, and the latter thereupon gave up defendant's original notes, and at the time the notes in question were transferred to plaintiff, the bank was a *bonâ fide* holder for valuable consideration without notice, and the plaintiff, as purchaser from the bank, or any one claiming through it, is entitled to stand on the bank's title, and his right to recover cannot be affected by notice or knowledge of any defect or infirmity unknown to the bank: *Daniel* on Negotiable Instruments, sec. 803. It is submitted that the evidence clearly establishes that the plaintiff stands in the position of a purchaser of the bank's title, but even should it be held that there was no sale of the notes by the bank, the plaintiff would nevertheless be entitled to recover as on a transfer from Bowman. Bowman, independently of any agreement for purchase, was, as surety for the Masson Company, entitled, upon payment by him of the debt due to the bank, to a transfer of all the securities held by the bank, and should be subrogated to the rights of the latter, and in all respects stand upon the bank's title: R. S. O. ch. 116, secs. 2 and 3; *Brandt* on Suretyship, secs. 260, 261, 264. A surety is entitled to the benefit of any security which the creditor has received for the debt, even though he received it after the contract of suretyship: *Campbell v. Bothwell*, 47 L. J. Q. B. 144; 38 L. T. 33. It may be contended that defendant was also a surety for the Masson Company, and that the question of contribution may have to be considered, but even if defendant could be regarded as a surety, it is clear upon the evidence that defendant and Bowman do not stand in the position of co-sureties. Upon reference to Bowman's bond, it will be seen that he

stands in the position of a supplemental surety ; and it has been held that a supplemental surety is not a co-surety with other parties, and that in such case there can be no contribution : *Baylies* on Sureties, 311. Putting defendant's defence on the highest possible ground, and assuming that plaintiff cannot in any way stand on the bank's title, but can only claim as on a transfer from the Masson Company, he would still be entitled to succeed in this action. The most defendant can claim is, that the notes were given for the accommodation of the Masson Company, or if held to be given for value, that he has a set-off against the company in respect of subsequent transferees ; and in either view, the plaintiff claiming as on a transfer for value from the Masson Company, even though the notes were transferred overdue, is entitled to recover. Assuming the notes to be accommodation notes, that the Masson Company had given them as collateral security to the bank for a debt which they afterwards paid ; that upon such payment they received from the bank the collateral notes, and then transferred them overdue to plaintiff as collateral security for a cash advance—the plaintiff would be entitled to recover thereon, since want of consideration between the original parties to a note is not an equity attaching on a transfer overdue, and even if plaintiff had notice of such want of consideration, his title would not be affected : *Chitty* on Bills, 11th ed., 161 ; *Re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344. Nor is a set-off any defence to an action by an endorsee of overdue accommodation notes : *Wood et al. v. Ross*, 8 C. P. 299.

December 24, 1881. CAMERON, J.—The most favourable position in which the defendant's case can be put, is to assume either that the evidence establishes that the notes sued upon were accommodation notes and without consideration, for the sole accommodation of the Masson Manufacturing Company, or that they were given under the terms of the agreement put in evidence, that the company was to take the customers' notes of the defendant and apply them to

and in payment of the notes given by him, for which the notes sued on were substituted or renewals of, and that the Dominion Bank had notice when they received the notes that they were accommodation notes or given under the said agreement; and that after the receipt by the bank thereof they were paid in full by the defendant to the company by means of farmers' or customers' paper or otherwise; and that plaintiff took them after they became due. Assuming this, would in either of these cases the defendant be relieved from liability, the bank in the first instance having taken them before due and given value for them, and the plaintiff having given value for them when he got them after they were due?

The law applicable to either of these positions is to be found very clearly stated, and the authorities reviewed, in the judgment of Malins, V. C., in *Re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344, in which the facts were: Catley & Co., carrying on business in St. Petersburg, drew several bills of exchange on Overend, Gurney & Co., amounting in the whole to £26,545, which were negotiated by the drawers in St. Petersburg, and afterwards accepted by Overend, Gurney & Co., and dishonoured by them at maturity, and were then taken up and paid *supra protest* for honour of the drawers. Messrs. Catley & Co., secured large quantities of Russian produce from the interior, to supply orders given to them through agents in England, drawing upon their customers for, as nearly as could be estimated, the full invoice price of the goods ordered, and for the purpose of obtaining the necessary banking facilities to carry on their business in Great Britain, entered into arrangements with Messrs. Overend, Gurney & Co. to act as their bankers, and in accordance with the arrangement drew bills at St. Petersburg from time to time on Overend, Gurney & Co., at some months date, at such times and for such amounts as they might require, and remitted to Overend, Gurney & Co. all bills upon Great Britain which came into their possession in the course of business, and by this means kept them in funds to meet the acceptances which they had

come under for them as they arrived at maturity. The arrangement was not that Catley & Co. should remit to cover particular acceptances, but that Overend, Gurney & Co. were to be kept out of cash advances. Overend, Gurney & Co. were paid one and a-half per cent. on all acceptances, and also an additional commission for overdrawing in excess of remittances to the amount of £10,000. On the 10th May, 1866, Overend, Gurney & Co. stopped payment, and were then under acceptances of Catley & Co. to the above amount of £26,500, which acceptances were current and not due; and, at the date of the winding up petition, there was a cash balance in the hands of Overend, Gurney & Co. of £6911 3s. 2d. The acceptances were duly presented as they matured by the various holders to Overend, Gurney & Co., dishonoured and protested for non-payment. Mr. Swan was one who had given orders to Catley & Co. for the shipment of large quantities of flax in the following spring, for the price of which Catley & Co. drew upon Mr. Swan, and the bills were remitted to Overend Gurney & Co., and were accepted by Mr. Swan and credited in account by Overend, Gurney & Co. to Catley & Co., and were duly paid at maturity. Mr. Swan had no open account with Catley & Co. At the date of Overend, Gurney & Co.'s suspension a very large quantity of flax, ordered by Swan from Catley & Co., for which he had given his acceptances, still remained at St. Petersburg in the possession of Catley & Co. for shipment. When Overend, Gurney & Co. suspended payment on the 10th May, 1866, the news was reported to Catley & Co, who telegraphed to their agents in England, if Overend, Gurney & Co.'s acceptances of their drafts were returned to St. Petersburg dishonoured they would be compelled to stop payment; and, in that event, the holders of the dishonored bills might stop the flax and other produce about to be shipped. Catley & Co.'s agents communicated with Swan, so that he might take any steps he thought fit for the protection of his interests; and he, after taking advice, determined, if the bills should be dishonored by Overend,

Gurney & Co., to take them up *supra protest*, so that the shipment of his flax might not be prevented. The bills were dishonoured and were paid by Swan, who claimed to be admitted a creditor of the estate of Overend, Gurney & Co. for the amount of the bills paid. This claim was resisted by the liquidator on the ground that the bills were accepted by Overend, Gurney & Co., for the accommodation of Catley & Co., for whose honour Swan had paid them, and he could have no better position than Catley & Co.; and, at all events, Swan should not be allowed to rank as a creditor to a greater amount than was at the credit of Catley & Co. at the time of the suspension of Overend, Gurney & Co., viz., £6911 3s. 2d.

With reference to the question of Swan's right, assuming the bills to have been accommodation bills, the learned Vice-Chancellor said, at page 357: "The general proposition that a person who takes an accommodation bill after it has been dishonoured, cannot be in a better situation than the drawer as against the acceptor, cannot now be maintained. I was admitted by Mr. Roxburgh, in his argument for the official liquidator, that the law is now settled that an indorsee for value of an accommodation bill after dishonour can recover against the acceptor, though the drawer himself could not have done so, and the authorities on that point most distinctly support that admission." And he further said at the end of his judgment: "I desire to be understood as resting my decision on two distinct points; first, that an indorsee or transferee for value of a bill of exchange after dishonour, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it. I have already stated that the right of set-off is not an equity which attaches to the bill itself. The only right of the acceptor against the drawer here was a right of set-off, or a right to take the accounts between them. That, as I have shewn by the authorities, is not an equity which attaches to the bill. Secondly, that the person who takes up a bill *supra protest* for the honour of

a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself endorse it over."

Applying the principle above stated to the facts in the present case, it would seem clear that if the notes can be treated as accommodation notes, as Mr. Masson in his evidence states they were—though I think they cannot, under the circumstances given in evidence, for reasons which I shall give presently, be so considered—the plaintiff would be clearly entitled to recover—the right of the Dominion Bank to enforce payment being unquestioned, as they took them before they were due, and held them for value, the immediate consideration given for them being the surrendering of the notes of the defendant for the same amounts held by the bank as collateral security for the discounting of the Masson Company's paper, and the overdraft they were allowed to make on their bank account; and assuming that the plaintiff, as was found by the learned Judge at the trial, has no better right than Bowman, it is abundantly apparent that Bowman, through the aid he received from the plaintiff, paid to the bank the full claim that the bank had against the Masson Company. The notes cannot be treated as accommodation notes; but if that is important, which it would seem not to be under the facts, they must hold the higher character of business paper. The notes for which they were substituted were clearly business paper given for the price of the machines bought by the defendant, and when the new notes—those sued on—were given for the purpose of renewing the notes held by the bank, they must for all purposes of the bank and others dealing with the bank in reference thereto, be regarded as possessing the same character as the originals.

In support of this proposition I refer to the language of Vice Chancellor Malins, in *Swan's Case*, at page 363: "It is also clear beyond all doubt that the estate of Overend,

Gurney & Co., has no equity to be discharged from the liability to pay these bills by the transaction in question. Overend Gurney & Co. had accepted the bills under a mercantile arrangement with the drawers, which must be considered as a valuable consideration for the acceptance. They had a commission, they had a good customer, and the arrangement was one of mercantile value; and therefore, as regards all third parties, at all events, they must be regarded as bills given for valuable consideration; and the bills were in the hands of *bonâ fide* holders for value, and it is perfectly right, therefore, that they should be bound to pay the bills, whoever might be the holder of them for value."

Then, regarding the notes as given subject to the terms that they were to be satisfied when farmers' notes were returned in of an amount equal to the notes themselves, of which arrangement the bank had notice when they first took these notes, I assume an equity would attach to the notes, to compel the bank to accept such farmers' notes guaranteed by the defendant, not extending the credit beyond eighteen months; but that equity would not prevent the notes being negotiated, or warrant the defendant in turning in notes to the company in settlement, without taking care to see that the company had the notes and were in a position to discharge the defendant from liability; and if he did so turn them in it must be at his own risk. He gave his notes in negotiable form, and he cannot be permitted to shelter himself from liability by saying that he paid them to the payees in ignorance that they had parted with them. But in this case it is manifest, from the evidence of Mr. Masson, the defendant did know the notes were held by the bank, if it is essential to show that he was aware the Masson Company had parted with them to the bank, and was not bound to see that the payees held them when making payments to them. In either view of the case the plaintiff is entitled to recover against the defendant.

It was urged also that Bowman must be regarded as

having paid the debt of the company for the company to the bank, and that the transaction must be treated as a loan by him of the money to the company, and the securities held by the bank were in effect delivered to the company, and by them transferred to Bowman, who transferred them to the plaintiff with no greater or higher rights than the company itself had with regard to the securities. But this contention cannot be maintained successfully under the evidence.

In *Swan's Case*, already referred to, Malins, V.C., at p. 363, said: "It is a sound rule to construe all instruments and acts in accordance with the intention of the parties, if it be possible to do so;" and here it is clear, by the resolution of the directors of the company, that the company intended to place Mr. Bowman in paying off the bank in the same position as the bank. That would also appear to be what Bowman and the plaintiff intended when they were raising the funds to pay the bank, and in taking over the securities.

It was contended, on behalf of the plaintiff, that by virtue of Bowman's position as surety for the Masson Company to the bank, he was entitled to all the securities held by the bank, and so the plaintiff, as his assignee, is entitled to maintain the present suit on the defendant's notes to the same extent that the bank could. The contention may be well founded, on the principle that a surety is entitled to be subrogated to all the rights of the creditor against his principal; but the liability of Bowman to the bank, as surety, was only to the extent of \$50,000, and as the amount of security taken over from the bank was, according to the evidence, about \$200,000, of which, according to the plaintiff's evidence, \$75,000 has been realized, and questions of accounting might arise that would require further evidence, I think it better to leave the case as presented by the declaration on the plaintiff's right to recover as holder of the promissory notes, than to embarrass it by considering the plaintiff's rights as representing Bowman in his character of surety.

I think, therefore, that the plaintiff's rule should be made absolute to enter a verdict for him for the amount of the notes sued on, together with interest at the rate of six per cent. from the time the notes respectively became due, and that judgment should be entered for him thereon with full costs of suit. It is, no doubt, a hard case upon the defendant to be called on to pay the debt twice; but the hardship is one that he has brought upon himself by his own want of care, and he is not by this plaintiff's act, or by Bowman's, placed in a worse position than he was before they intervened. The well-settled law that *bonâ fide* holders of negotiable paper are protected in their rights, and are not affected by dealings such as create the present hardship, cannot and ought not to be invaded to give him relief from the consequences of his want of care or overconfidence in the Manufacturing Company.

HAGARTY, C. J.—On the evidence before us I can see no reason to doubt but that the Dominion Bank held these two notes of defendant, with the other notes and securities deposited with them, to protect them for their advances to the Masson Company, and that they could have recovered against defendant so long as any portions of such advances remained unpaid.

In fact we may assume that the defendant gave the notes, and the substituted or renewed notes, for the express purpose of enabling the company so to use them.

Any person paying off the bank their advances, and taking or purchasing from them all the securities so held, could enforce them to the same extent as the bank could have done.

We have to see whether the present case furnishes any special circumstances to prevent the application of the general rule.

I see nothing in the evidence against the clear right of the bank to enforce these notes. They were taken in the ordinary course of business. Nor can I find any evidence that Bowman had any actual knowledge of the state of

the account with defendant. He denies all such knowledge in his affidavit, and Scott, the accountant, swore that Bowman, as president, used to attend the meetings, and that was about all: that Mr. Masson had the general management.

The learned Judge found that Bowman had a personal knowledge of the agreement between the company and defendant, and that plaintiff and Bowman were acting together in the management of the affairs of the manufacturing company, and that the notes had been paid.

If this had been a special finding by a jury I do not think that a verdict for defendant thereon could be supported.

The general law is well stated in 1 Daniel p. 656, sec. 803, *et seq*: "As a general rule the purchaser can never be placed on a worse footing than his transferrer, although he himself could not in the first instance have acquired the vantage ground occupied by such transferrer * * As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established, and the power of transferring it to others with the same immunity which attaches in his own hands is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the *bonâ fide* holder in its enjoyment. To prohibit him from selling as good a right and title as he himself has would destroy the very object for which they are secured to him, and would indeed be paradoxical."

He then quotes Story, pointing out how indispensable this rule is to the circulation and security of negotiable instruments. Numerous authorities are cited. It is pointed out that in some of the United States, an exception is made when the original payee of the note sues.

It was attempted, on the argument, to establish, first, that plaintiff could be in no better position than Bowman, and secondly, that Bowman could be in no better position than the Masson Company.

I do not feel it necessary to discuss whether the com-

pany could recover on these notes in their own name, or set up the bank title, as I am against the defendant on both of the above suggestions.

Bowman had long been the president of this incorporated company, and had ceased so to be when this arrangement was made.

I think he had the right for his own protection, as surety for the company, to raise money on his own resources to pay off the debt for which he was responsible, and to acquire the same interest which the bank had in these securities.

In the absence of any fraud or collusive action between him and the company, for the purpose of compelling defendant to pay an unjust claim, I cannot see why he was not at liberty to act as he did.

The mere fact of his being or having been an officer of the company, could not, I think, interfere with his right so to act.

I think the evidence clearly shews that he raised and paid this money to the bank solely for his own protection, and in no way by any collusion with the company.

The plaintiff in good faith advanced the money to Bowman on the faith of getting all these bank securities, and through Mr. English, who was acting for him as well as for Bowman, became possessed thereof and clothed with all the bank rights and interest in such securities.

I do not see how the defendant is substantially injured by what took place.

He was perfectly aware when he gave the notes, and when he renewed them, that they were to go into the bank as collateral security for the company's existing or future debt to the bank. He could have no defence whatever to the bank's claim against him therefor.

The bank has not been paid by the company, and but for Bowman and the plaintiff's intervention might still remain entitled to enforce them.

Their right is simply transferred to another person paying off their claim, and who now seeks to do what they could equally have done.

I think plaintiff's right, whether he claims as taking direct from the bank or merely through Bowman, cannot be denied.

Plaintiff knew nothing of any objection to these notes. Bowman swears to the same effect, and that he did not even know at the time that the bank held these notes.

I think the defendant fails to affect either plaintiff or Bowman with notice of any defence on his part to the notes; and, even if he succeeded in so doing, it would be difficult, at all events in the absence of fraud or collusive contrivance, to prevent a recovery on the well known principle of purchasing or getting in the unimpeachable title of a former holder.

I think this rule should be absolute to enter a verdict for plaintiff

The case of *Ex parte Swan re Overend, Gurney & Co.*, L. R. 6 Eq. 34, contains a good summary of authorities.

ARMOUR, J., concurred.

Rule absolute.

MEMORANDA.

During Michaelmas Sittings of this Court, the following gentlemen were called to the Bar:

CHARLES CROSSLEY GOING, ARCHIBALD JAMES SINCLAIR
SIDNEY WOOD, EARNEST V. D. BODWELL, FRANK MARSHALL
MCDUGALL, ARCHIBALD STEWART, WILLIAM PROUDFOOT
WILLIAM CAYLEY HAMILTON, JOHN RUSSELL, RUFUS
SHOREY NEVELL, GEORGE WILLIAM BEYNON, THOMAS
TREVOR BAINS, GEORGE MILES LEE, HENRY GALE, JOHN
REEVE LAVELLE, DANIEL FRASER MCWATT, ALFRED
BEVERLEY COX, JOHN HENRY D. MUNSON, EDWARD A.
PECK, VICTOR CHISHOLM, WILLIAM HUMPHREY BENNETT,
GEORGE H. MUIRHEAD, FRANK ANDREW HILTON, GEORGE
HENRY SMITH, NATHANIEL MILLS, NEWENHAM P. GRAYDON,
HENRY BOUCHER WELLER, JOHN LAWRENCE DOWLIN,
ROBERT CASSIDY.

IN THE HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

IN RE THE ARBITRATION BETWEEN THE CORPORATION OF THE CITY OF ST. CATHARINES AND THE CORPORATION OF THE COUNTY OF LINCOLN.

*Award between city and county—R. S. O. ch. 174, secs. 42, 445, 457—
Discretion of arbitrators.*

In proceedings upon arbitration between a city and county under secs. 42, 445, 446, and 447 of the Municipal Act, the questions submitted are largely in the discretion of the arbitrators, no principle or rule being laid down by the statute. Where, therefore, arbitrators in forming estimates of the proportion of expenditure to be borne by the city and county under these sections, took population as a basis instead of the assessment rolls, *Held*, that this was no ground for interference. The Court refused also to interfere with the compensation awarded for care and maintenance of prisoners.

The arbitrators having awarded as to the macadamized road lying in the county and city, a matter not submitted to them, the clause was struck out of the award, with costs, which were fixed at \$10.

THE town of St. Catharines was incorporated as a city by 39 Vict. ch. 46, O. The Act provided that the city should remain subject to the jurisdiction of the county council in the same manner as a town not separated from the county, but might withdraw from such jurisdiction in the same manner as a town could do, and the clauses of the Municipal Act, now R. S. O. ch. 174, secs. 22 and 23, and their subsections, as to the withdrawal of a town from the county, and the proceedings consequent thereon, were incorporated in the Act.

The city afterwards passed a by-law to withdraw from the jurisdiction of the county, and an award was made between the two corporations as to their debts and assets, and adjusting the amount to be paid by the city to the county for the expenses of the administration of justice, use of the gaol, registry office, &c., and other matters referred to in sec. 22, and subsections of the Municipal Act.

This award remained in force for the period of five years from the 1st of May, 1876.

On the 9th May, 1881, the city passed a by-law reciting that the award had lapsed by effluxion of time, and that it was expedient and necessary that a new award should be made between the corporations. The by-law then appointed an arbitrator on behalf of the city, for the purpose of considering and awarding as to the several matters requiring adjustment between them, referred to in *the Municipal Act*, from the 1st of May, 1881.

On the 8th June, 1881, the county council passed a by-law reciting the by-law passed by the city, and appointing an arbitrator on behalf of the county. The two arbitrators subsequently appointed the learned Judge of the County Court of the county of Brant as third arbitrator.

On the 13th July two of the arbitrators made an award, in which the arbitrator who had been appointed by the county refused to join.

The following are the portions of the award material to be noticed :

3. We hereby find and award that the city pay to the county as compensation for the use of the gaol property, real and personal, and its appurtenances, and all other gaol property, the yearly sum of \$446.10, to be computed from the 1st day of May last, and to continue for five years from that date, the first of such payments to become due and payable on the 1st day of May, 1882.

4. We further find and award that the city pay annually to the county in the proportion of \$4 by the city to \$8 by the county, for all necessary and proper expenses payable by the county, as hereinafter set forth, in keeping and taking care of all prisoners committed to the said gaol, and others duly confined therein, and for salaries of gaoler, turnkey, matron, gaol-surgeon, and of any assistants required in the disciplinary manage-

ment of the gaol, for printing, postage, stationery, and current renewals of gaol library, fuel, light, water, soap, cleaning and cleansing appliances, not fixtures, prison dietaries, medicines, and extras known as hospital dietaries, ordered by the surgeon, current renewals of bedding, clothing, and stores, conveyance of prisoners to and from the court-house, and other expenses not herein particularly enumerated, incurred in the ordinary management of the said gaol. The same to be payable quarterly from the 1st day of May last, but the proportion thereof to be borne by the city to be payable only so soon as the net amount of said expenses after deducting the amount contributed by the Province towards payment thereof has been ascertained, this to continue for five years from the 1st day of May last.

5. In respect to the expenses for administration of justice, we find and award as follows : That the city pay to the county in the proportion of \$3 for the city to \$8 for the county, in quarterly instalments, from the 1st of May last, and during five years therefrom, for the expenses of juries, there first having been deducted all sums that may have been received by the county in the same proportion as last stated, and for five years from the said 1st day of May last towards the expenses of indigent witnesses in criminal cases, not payable under the Act to provide for the payment of the witnesses for the Crown (R. S. O. c. 87), and towards the cost of printing and stationery required in the administration of justice, and towards all other necessary expenses in the administration of justice, and on which no specific award is otherwise herein made, such payments to be made quarterly as aforesaid, and after there shall have been deducted all sums received by the county in respect thereof as aforesaid.

6. We further find and award, that all necessary expenses for which the county is liable, connected with the use of court-house, rooms, and all proper and necessary fuel, light, and furniture for the courts of justice, and for all offices connected with such courts, and for all other charges relating to criminal justice payable to the county in the first instance, except constables' fees and disbursements and charges connected with coroners' inquests, and such other charges as the counties are entitled to be repaid by the Province, shall be borne by the said parties in the proportion of \$3 by the city to \$8 by the county, payable by the county quarterly, from the 1st day of May last, and to continue for five years from that date.

7. We further find and award, that the city pay to the county at the rate of \$76.81 per annum for the use of the registry office, to be computed from the said 1st day of May last, the first payment to be made on the 1st day of May next, and to continue for five years from the 1st day of May last.

8. We further find and award, that the city pay to the county in yearly payments, from the 1st day of May last, towards the expenses necessarily and legally incurred for books, furniture, lights, fuel, care of building and appurtenances, or otherwise howsoever in the ordinary management of the said registry office, and for which no provisions are by law or otherwise made, in the proportion of \$3 by the city to \$8 by the county, and to continue for five years from the first day of May last.

9. And as to the Queenston and Grimsby macadamized road, which at the time of the separation of the said city from the said county, was owned jointly by the said city and the said county, the award made at the time of the said separation of the said city and county not having made provision as to the future proprietorship of said road, or as to the compensation payable by either party in respect thereof, we hereby find and award that all that portion of the said road which lies within the city, shall be and remain the exclusive property of the city, and all that portion that lies within the county shall be and remain the exclusive property of the county. And the said road being unproductive of any revenue, and being divided and allotted between the city and county as aforesaid, we do not award the payment of any sum of money, either by the city to the county, or by the county to the city in respect thereof.

This award was, by notice dated August 30th, 1881, moved against on the grounds :

1. That it was unjust in this, that it imposed upon the county a larger amount in respect of the administration of justice, the use of the gaol, the repairs and use of the registry office, and providing books for the same, and for other services for which the county was liable under any statute in that behalf for the five years from the 1st day of May, 1881, than the said county should bear, and did not provide for a sufficiently large sum being paid in respect of those matters by the city to the county.

2. That the award was not sustained by the evidence before the arbitrators.

3. On the ground that the award was against the evidence adduced before the arbitrators.

4. On the ground that the former award made on the separation of the city from the county, and which was acquiesced in, was just, and that no case had been made for varying the same.

5. On the ground that proceedings were not commenced by the arbitrators within twenty-one days after the appointment of the third arbitrator as provided by the Act; or why the ninth clause of the award relating to the Queenstown and Grimsby macadamized road should not be set aside and struck out of the award, on the ground that it did not come within the scope of the reference; all liability in respect of the said road being settled by an Act of the

Parliament of the late Province of Canada, 26 Vict. ch. 13.

November 2, 1881. *Bethune, Q. C., (Rykert with him,)* appeared for the applicants.

Robinson, Q. C., and F. W. McDonald, contra.

December 20, 1881. OSLER, J.—Upon the best consideration I have been able to give to the arguments advanced by the learned counsel for the appellants, and after a careful perusal of all the papers, I am of opinion that a case has not been made out for setting aside this award in any substantial particular.

The onus of shewing that the arbitrators have not arrived at a just conclusion on the merits emphatically rests upon those who impeach such an award.

It is an award which deals with large public interests, so far as these corporations are concerned, and has been made by competent and experienced arbitrators, one of them (the third arbitrator,) a County Judge of great experience, and peculiarly competent as such to deal with the questions involved in the reference. Every intendment should be made in favour of such an award.

As it deals with compensation to be paid by the city for the use of the Court house, and for the care and maintenance of prisoners, I assume, nothing having been said to the contrary and no objection having been taken on that ground, that proceedings were originated and carried on under sections 445, 446 and 447, of the Municipal Act, as well as under section 22, the latter being applicable only by virtue of the special terms of the Act incorporating the city.

It appears that no witnesses were sworn upon the reference. The case was argued upon facts admitted by counsel for the parties, and official information as to population, assessments, valuations and statistics of expenditure, and other matters, full notes of which were taken by the arbitrators and are now before me.

The point chiefly insisted on by the county before the arbitrators and on the present motion was, that the assessment rolls of the two municipalities formed the proper, and indeed the only basis on which the proportion of the expenses to be borne by the city should be ascertained. The city contended that population was a safer guide. The Act does not lay down any principle or rule by which the arbitrators are to be governed in ascertaining the proportion.

Section 22, subsections 1 & 5, speaks of the amount which the town is to pay to the county for (a) the expenses of the administration of justice, (b) the use of the gaol, (c) erection and repairs of the registry office, the providing of books for the same, and for services for which the county is liable under any Act respecting the registration of instruments relating to lands.

Section 445, as amended by 42 Vict. ch. 31, sec. 17, and 43 Vict. ch. 24, sec. 10, O., declares that cities and towns separated from counties shall bear and pay their just share and proportion of all charges and expenses, from time to time as they may be incurred, of (a) erecting buildings, repairing and maintaining the Court house and gaol, and (b) of the proper lighting, cleansing, and heating thereof, (c) and of providing all necessary and proper accommodation, fuel, light and furniture, for the gaol and Courts of justice (other than Division Courts), (d) and all other things relating to criminal justice, payable by the county in the first instance, except constables' fees, and coroners' charges; and section 446 enacts that, while a city or town uses the Court house or gaol of the county, the city or town shall pay the county "such compensation therefor, and for the care and maintenance of prisoners, as may be mutually agreed upon, or settled by arbitration under this Act."

The whole question therefore rests largely in the reasonable discretion of the arbitrators.

From a careful perusal of the notes of evidence and arguments taken by the arbitrators, it appears to me that

in several of the matters awarded on they have taken the populations of the county and city as nearly as they could be ascertained, as the basis on which to estimate the proportion to be paid by the city.

I do not think they were wrong in doing so; on the contrary, it seems to me that as to all such expenses as must be incurred by the county in any event, such, *e. g.*, as the use, maintenance, and repair of Court house, and gaol, and registry office, official salaries, &c., population is, as a general rule a very fair basis. So also as to the expenses of the administration of justice; in all cases, however, subject to any special circumstances (which do not exist in the present case), shewing that a larger proportion of any particular item of expense should be borne by one corporation rather than the other.

To adopt the comparative assessments of the city and county as a basis would, owing to the practical difference in assessing city and county property, be entirely illusory and unjust; and an attempt to correct it by equalizing the assessment is at best but a rule of thumb expedient when the different elements which constitute city and county assessment are considered.

The fifth paragraph of the award deals with the expenses of the administration of justice; the sixth with the expense connected with the use of the Court house, fuel, light, and furniture for Courts of justice, and charges relating to criminal justice; and the eighth with the expenses incurred in the management of the registry office.

As to all these expenses the city is directed to pay the county in the proportion of \$3 for the city to \$8 for the county on the net amount, after deducting everything which may be received by the county from the Province.

The third paragraph awards the compensation to be paid by the city to the county for the use of the gaol. As to this the arbitrators have adopted a different principle. The gaol and registry office, before the separation of the city from the county, were the joint property of the two corpo-

rations, and under the first award the county paid the city the sum of \$7,435.89 for their interest in the gaol property. The present award fixes the sum of \$446.10 as compensation for the use of the gaol, being apparently a sum equal to six per cent. upon the amount so paid by the county. So also as to the registry office, for the use of which by the city the arbitrators have, by the seventh paragraph of the award, directed that the city shall pay the county \$76.81 per annum, which is the equivalent of six per cent. upon the sum paid to the city for their interest therein under the former award.

I do not see anything in the Act which entitles the county to claim anything from the city for the *use* of the registry office. They must, under section 22, contribute to its erection and repairs, and the expense of books, &c., as already mentioned, nothing being said as to compensation for its use. No objection to the award is made by the city, and I assume that all parties have treated this more as an allowance for repairs. Considering what appears upon the notes of the evidence as to the cost of repairs and the amount which the county receives yearly from the registrar as the surplus income of the office, the sum in question is a very liberal allowance.

The fourth paragraph provides that the city shall pay annually to the county in the proportion of \$4 by the city to \$8 by the county, for necessary expenses payable by the county in keeping and taking care of prisoners committed to the gaol, and others duly confined therein, salaries of gaol officials, gaol accommodation and management, conveyance of prisoners to and from the Court House, and all other expenses not specified, incurred in the ordinary management of the gaol.

The county complains that the award is specially inequitable towards them in this respect, so far as it relates to the compensation for the care and maintenance of prisoners, inasmuch as by far the greater number of prisoners confined in the gaol for the last five years were persons sentenced by the police magistrate for non-indictable offences presumably committed in the city.

It was pressed upon the arbitrators that this state of things was exceptional, so that the records of the past five years formed no criterion for the future, and it was contended that many of these prisoners must have been vagrants or other persons whose residence might as well be said to be in the county as in the city.

Under this head, the arbitrators giving effect, no doubt, to the arguments on both sides, have directed the city to pay in the proportion of \$4 for the city to \$8 for the county, instead of as \$3 to \$8 under other heads of expense, the county in this respect receiving the benefit of the increased proportion, as regards gaol salaries, and other items of expense, which might well have been dealt with in the same way as paragraphs five, six, and eight.

As to those paragraphs, it appears to me, I confess, that the arbitrators were right. As to the sixth paragraph, I cannot say that they are wrong, although I confess that I should, with some modification, have been disposed to adopt the figures of the past five years as a basis for the present award. There is evidence upon which they might satisfy themselves that the proportion they have adopted will prove to be a fair one. There is no affidavit from the arbitrator who did not join in the award to shew that it will not.

Therefore I decline to set aside or refer back the award as to any of the matters dealt with by it, inclusive of the eighth paragraph. It is no doubt more favourable to the city than the former award, but it is also, in my judgment, more equitable.

I have not overlooked the case of *In re Albemarle and Eastnor*, 46 U. C. R. 183, to which the parties have referred me since the argument; but in looking at the notice of motion here it will be seen that the case is not entirely applicable. Moreover, I think that there is sufficient on the papers filed and notes of evidence returned to enable me to see, or at all events to surmise pretty accurately, the grounds on which the arbitrators have based their award.

The only other paragraph of the award which has been objected to is the ninth, which awards as to the Queenston and Grimsby macadamized road, that as to all that part of it which lies within the city it shall be the property of the city, and as to that part which lies within the county it shall be the property of the county, and the road being unproductive of revenue, and being divided and allotted between the city and county, the arbitrators do not award payment of any sum by either party to the other in respect of it.

The county contend that this was not a matter submitted to the arbitrators, and that their rights in respect of it as against the city are governed by the Act 26 Vic. ch. 13.

It was hardly argued that this was a matter embraced in the submission, and on looking at the by-laws appointing the arbitrators, it seems quite clear that it was not. This clause must therefore be struck out. As to so much of the award the motion is allowed, with costs, which I fix at \$10; as to the residue, discharged, with costs, to be taxed by the taxing officer.

Judgment accordingly.

VETTER V. COWAN.

Capias—Issue of before writ of summons.

Notwithstanding the Judicature Act, sec. 90 and rule 5, a writ of *capias* may still be issued under R. S. O. ch. 67, and the C. L. P. Act before an action has been commenced by a writ of summons.

THE defendant was arrested on a writ of *capias* issued out of the office of the Deputy Clerk of the Crown for the county of Huron, under an order made on the 18th of November last, by the learned Judge of the County Court of the said county, before any writ of summons had been issued to commence the suit, to hold the defendant to bail in the sum of \$500, in an action for breach of promise of marriage, described as an "action on promises."

On 25th November, 1881, *Shepley* moved on notice to set aside the order, writ, and arrest, and all proceedings, with costs, on several grounds, the most important of which, in the view taken by the learned Judge, and the only one therefore necessary to be specially referred to, was, that the order having been made before a suit had been commenced by summons, the learned County Court Judge had no authority to make the same, and it was therefore void.

Aylesworth. The power to arrest is a right given to the subject by R. S. O. ch. 67, which cannot be taken away but by express enactment, nor affected by statutory rules as to procedure or practice, such as those of the Judicature Act. But even if it were otherwise, there was a waiver by putting in special bail.

Shepley, contra. The issuing of a *capias* to commence an action is inconsistent with the Judicature Act, rules 1 and 5, providing that all actions shall begin by writ of summons. These rules are inconsistent with R. S. O. ch 67, and therefore the latter must be taken to have been amended by them.

December 21, 1881. CAMERON, J.—By Order 2, Rule 5, under the Judicature Act, it is provided, "Every action in

the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and specifying the Division of the High Court to which the action is assigned ;” and it was very forcibly and perhaps soundly contended by Mr. Shepley in support of the motion that the effect of this, read in connection with section 90 of the Judicature Act, which repeals any enactment inconsistent with the said Act, was to repeal, as far at least as relates to an arrest before action, section 5 of ch. 67, R. S. O. This clause provides that “In case any party or plaintiff, being a creditor of or having a cause of action against any person liable to arrest, by the affidavit of himself or of some other individual shows to the satisfaction of a Judge of either of the Superior Courts of Common Law, or to the Judge or acting Judge of any County Court, that such party or plaintiff has a cause of action against such person to the amount of \$100 or upwards, or that he has sustained damage to that amount, and also by affidavit shows such facts and circumstances as satisfy the said Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the said party or plaintiff in particular, such Judge may by a special order direct that the person against whom the application is made, as being about to quit Ontario, * * shall be held to bail for such sum as the Judge thinks fit, and thereupon such party or plaintiff, within the time expressed in such order, but not afterwards, may sue out a writ of *capias*, * * and the Judge or acting Judge of any County Court may grant such orders to hold to bail where process is intended to be sued out of, or an action has been commenced in, either of the said Superior Courts, as well as in his own Court.”

It is quite clear from this provision that before the Judicature Act there could be no question that an order to hold to bail might be granted before the commencement of the action. The writ of *capias* mentioned in this Act is the

writ mentioned in section 4 of ch. 50, R. S. O., otherwise the Common Law Procedure Act, and is to be in the form No. 2, Schedule A, to that Act. The writ in this case conforms to the form given in said schedule, except in so far as modified to meet the change in the style of the Court effected by the Judicature Act, and rendered necessary by that Act.

From section 3 of the Common Law Procedure Act, and other sections below referred to, it is clear under that Act a writ of *capias* would be a commencement of suit.

The said section provides: "Except in cases where it is intended to hold the defendant to special bail, all personal actions * * shall be commenced by writ of summons." And by section 4: "In case any person is to be arrested and held to special bail, the proceedings shall be by writ of *capias* * * which writ shall bear date, be tested, and (in addition to other indorsements) be endorsed in the same manner as writs of summons, and may be directed to the sheriff of any county in Ontario."

By section 33: "Every writ of *capias*, and so many copies thereof as there are persons intended to be arrested thereon or served therewith, together with every memorandum or notice subscribed thereto, and all endorsements thereon, shall be delivered with the original writ to the sheriff or other officer to whom such writ is directed, and who has the execution and return thereof, and the plaintiff or his attorney may order such sheriff or officer to arrest one or more of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or officer."

Section 35: "Such service shall be of the same force and effect as the service of a writ of summons hereinbefore mentioned; and subsequent proceedings, whether after an arrest and service or service only, shall in all the Courts be according to the practice in force in the Superior Courts in like cases."

Section 39: "Special bail may be put in and perfected according to the established practice; and after special

bail has been so put in, the plaintiff may, by filing a declaration or otherwise, proceed to judgment, in like manner as if the action had been commenced by writ of summons, and the defendant had appeared thereto."

The question then is, has Order 2, Rule 5, under the Judicature Act, which declares as above set out: "Every action in the High Court shall be commenced by a writ of summons," abrogated both the provisions in the Common Law Procedure Act relating to the writ of *capias*, and the above section 5 of ch. 67 R. S. O.? Mr. Shepley very forcibly contended that it has; as in England under the Imperial Act 1 & 2 Vict. ch. 110, in *Williams et al. v. Griffith*, 3 Ex. 584, it had been held a *capias* could not be issued except at the instance of a plaintiff and after action brought, which Act was in effect identical with the provisions contained in section 5 of ch. 67 R. S. O., when order 2, rule 5, of the Judicature Act is read therewith, as he contended it must now be.

Section 2 of ch. 110, Imperial Act 1 & 2 Vict., provides: "All personal actions in Her Majesty's Superior Courts of law at Westminster shall be commenced by writ of summons."

Section 3 is the same as section 5 of ch. 67 R. S. O., with some unimportant differences, except that the words "party or" are omitted before the word "plaintiff" in the first line of the section in the Imperial Act, which reads: "If any plaintiff" in any action * * in which the defendant is now liable to arrest, &c., and the provision allowing a Judge of the County Court to make the order to hold to bail, where process is to be sued out of the Superior Courts, as well as where it is to be sued out of the County Court. These differences are very important, and upon their effect much must depend in the decision of the case before me.

In the case of *Williams v. Griffith*, above referred to, Parke, B., said: "The title of any one to sue out the new species of *capias* founded on 1 & 2 Vict. ch. 110, depends on his being a plaintiff in a suit as well as having a cause of action. By section 3, a plaintiff alone can sue it out;

by section 5 he must do so *after* the commencement of the suit, which, by section 2, must be begun by a writ of summons."

Now by section 5, of ch. 67, R. S. O. it is not only a plaintiff, but any party having a cause of action of the proper amount, who may sue out the *capias*, and there would be no difficulty in determining the case were it not for the provision contained in Order 2, Rule 5, of the Judicature Act, which in effect prohibits the commencement of an action except by writ of summons, and has raised the contention now presented on behalf of the defendant.

In a case heard before my brother Osler, in Chambers, he seemed to take the view that the writ of summons is the commencement of the action, and the *capias* is a proceeding in the suit already brought. In the case before him, as the action had been commenced before the issue of the writ of *capias*, he was not considering the question in the aspect in which it has been presented before the Court on the present motion, and it cannot be said that he has decided it. It was contended before him that the omission of the division of the High Court in the title of the affidavit on which the order to hold to bail had been granted was a fatal defect, and further, in reference to the writ of *capias* itself, it was not a proper writ to have been issued on the order.

These objections were the second and fourth in order taken on the application before him, and in reference thereto he said: "The second objection was not a fatal one before the recent change in the practice, where an action might be commenced by a writ of *capias*. The style and title of the Court might be added at the time of suing out process, and it was as much the duty of the officer as of the party to see that this was done, and if omitted the affidavit might be amended. The writ of summons is now the commencement of the action and the *capias* is a proceeding in the suit already brought in one of the divisions of the High Court. Here the affidavit is intituled in the only Court in which it can be intituled

viz., in the High Court of Justice, and the only omission is that of the division to which the cause is assigned. I think that defect is clearly amendable. So also is the fourth objection. The form³ of *capias* which was used is that formerly used for the commencement of an action. There is a difference in the warning to the defendant on this writ and that endorsed on the form of *capias* after action. The copy of the writ which was served on the defendant having been filed, it may be amended and taken off the files."

The case is not yet reported, but I have seen the reporter's proof copy of the judgment, which will appear in volume 9, Ontario Practice Reports, 16, under the name of *Robertson v. Coulton*.

I have given this lengthy extract both for the purpose of clearly presenting that the learned Judge did not therein decide the question now before the Court, and also to show that the other objections taken to the regularity of the plaintiff's proceedings, to which I do not intend more fully to advert, if well founded, would be removable by amendment, and the amendment would be such as ought to be allowed without the imposition of costs in this case, as the irregularities could not prejudice the defendant.

This decision also establishes that in the opinion of the learned Judge the writ of *capias* is a process that has not been entirely taken away by the Judicature Act, although in that Act there is no mention of a *capias* or the proceedings thereunder, which is a step towards determining that it has not been affected at all by the Act.

The right to arrest is given by an Act totally independent of the Acts regulating the practice and procedure of the Court, passed for the express purpose of making a law in relation to imprisonment for debt. As originally passed, 22 Vict. ch. 96, it was intituled "An Act for abolishing arrest in civil actions, and for the better prevention and more effectual punishment of fraud."

By this Act the right of a party to arrest in a case like the present, and by the process called a *capias*, which was the process then, that is to say, in 1858, in force under the

Common Law Procedure Act of 1854, was given, and this Act did not declare that the writ of *capias* should be the commencement of the action, or make any provision for the proceedings to be taken after arrest, which were regulated by the law then in force in regard to the practice in such matters. If the right to issue a *capias*, a writ not in terms recognized or provided by the Judicature Act, after action, is not taken away by that Act, why should it be before the commencement by writ of summons? It seems to me it must be treated as an existing writ ancillary, so to speak, to the proceedings in the action, and if not now, when it is the first process issued, the commencement of the action, the plaintiff should issue his summons and proceed under the Judicature Act. It may be, to enable him to get on with his suit, he will have to do so. It is not essential to determine that on this application.

It must be held, I think, that the right to arrest for debt or other cause of action under ch. 67, R. S. O., has not been taken away or affected by order 2, rule 5, or by section 90 of the Judicature Act, and that it remains with all the provisions of the Common Law Procedure Act necessary to give a plaintiff the security of the defendant's person, or of special bail, to answer any judgment that may be recovered against him in respect of the cause of action for which the arrest was made. If the objection were entitled to prevail, I should hold it fatal, and not waived by the putting in of special bail, as it would have been clearly *ultra vires* the Judge to have made the order until the action had been commenced, and the act of putting in bail would not have conferred the jurisdiction. I think the motion must be dismissed, with costs to be costs in the cause to the plaintiff, in any event of the suit.

I may add that I see no reason whatever on the merits, apart from the objection to the right to issue a writ of *capias* before action, to relieve the defendant. The affidavits before the County Judge quite warranted the order made by him.

Judgment accordingly

REGINA v. SMITH.

Conviction—Regularity—Request to proceed summarily—Distress—Estoppel.

The defendant was convicted of a common assault, upon the complaint of the prosecutor, who verbally requested the magistrate to proceed summarily. *Held*, that the request to proceed summarily need not be in writing.

The conviction adjudged payment of a fine and costs, and in default imprisonment. *Held*, good; and that it was not necessary to order that a distress warrant to compel payment of the fine should be issued before imprisonment.

Held, also, (1) that the fact that the memorandum of conviction differed from the conviction as returned, in not providing for imprisonment in default of payment, did not invalidate the conviction, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up; (2) the defendant, having had the *certiorari* directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them.

The defendant was convicted on the 25th May, 1881, before John Wood, a Justice of the Peace for the county of Bruce, for "unlawfully striking one Dunbar with a hand-spike over the eye, without any provocation," and was adjudged to pay a fine of five dollars and costs, and in default to be imprisoned in the common gaol of the county of Bruce for two months.

The conviction, depositions, and other papers having been returned into this Court upon a *certiorari*,

H. J. Scott obtained a rule *nisi*, calling upon the prosecutor and the convicting Justice to shew cause why the conviction should not be quashed, upon the grounds mentioned in the judgment.

Allan Cassels, shewed cause, and *Scott* supported the rule. The arguments sufficiently appear in the judgment.

December 10, 1881. OSLER, J.—The defendant was summarily convicted and fined for a common assault, upon a complaint taken in writing and on oath. The complaint as returned upon the *certiorari* does not pray the Justice to proceed summarily, but upon the affidavits now before me it appears that the prosecutor did in fact

require the charge to be so proceeded with, and the question is, whether that is sufficient. The defendant contends that the request should appear in the written and sworn information or complaint, or at least that when such a complaint is silent on the point, it ought to be assumed that the prosecutor did not wish the charge to be dealt with summarily.

The 43rd section of the Act respecting offences against the person, 32-33 Vic., ch. 20, D. provides that when any person unlawfully assaults or beats any other person, any Justice of the Peace, upon complaint by or on behalf of the party aggrieved, praying him to proceed summarily on the complaint, may hear and determine such offence.

The Summary Convictions Act, 32-33 Vic. ch. 31, D. enacts that complaints upon which a Justice of the Peace is authorized to make an order, and all informations for any offence or act punishable on summary conviction, may be made or laid without any oath or affirmation as to the truth thereof, unless otherwise required by some particular Act, &c. But in all cases of summary informations where the Justice issues his warrant in the first instance to apprehend the defendant, and in every case where he issues his warrant in the first instance, the matter of the complaint must be established by the oath, &c., of the informant, &c., before the warrant is issued: Secs. 24, 25.

Even, however, where the information must be on oath, it is not necessary that it should be in writing, unless it is by the particular Act in any case expressly directed to be so: *Paley on Convictions*, p. 73.

Regina v. Shaw, 23 U. C. R. 616, decides that the conviction need not shew on its face that the complainant prayed the Justice to proceed summarily. It is sufficient if it be drawn up in the form applicable to the case given in the schedule to the Act.

Westbrook v. Callaghan, 12 C. P. 616, shews that in pleading such a conviction it must be averred that the Justice was required to proceed summarily.

The question is, whether the Justice had jurisdiction in fact, and that depends on whether the complainant prayed him to proceed summarily. If, as was the case here, it was not necessary that the information or complaint should be in writing, or on oath, I do not see why it may not be shewn as a fact, apart from the written complaint, that the complainant did, when before the Justice, either on laying the complaint or at the hearing, request him to dispose of the charge summarily. It would be prudent for a magistrate to take the information or complaint in writing in all cases, and also to state on the face thereof the prayer for summary proceedings, so that no room might be left for doubt; but his jurisdiction does not, in my opinion, depend on his doing so, if it was not necessary that the complaint should be in writing.

As to the second objection, that the conviction adjudges payment of the fine and costs, and that if they are not paid within twenty days the defendant shall be committed to the common gaol for two months, unless such fine and costs be sooner paid.

I think this is right, and that the Justice was not bound to order that a distress warrant should be issued before imprisonment.

Section 43, already referred to, expressly provides imprisonment as the mode of enforcing payment of the penalty in this case; and by section 57 of the Summary Conviction Act, it is only when by the Act authorizing the conviction the penalty is to be levied by distress, and in cases where by the Act no mode of enforcing payment of the penalty is stated as provided, that the Justice is required to issue a distress warrant: *Arnott v. Bradley*, 23 C. P. 1.

The conviction, moreover, follows the form given in the schedule (I. 2,) (K. 2,) and even if a commitment would be irregular without an attempt being first made to levy the penalty by distress and sale of the offender's goods, it is no objection to the conviction that it says nothing as to that: *Regina v. Shaw*, supra.

The third objection is, that the original memorandum of

conviction differs materially from the subsequent conviction returned to the Clerk of the Peace, and does not provide for the imprisonment of the defendant in default of payment.

I can only take notice of the conviction which has been returned with the *certiorari*, which appears to be in all respects regular and sufficient in form.

If the penalty appears to be properly ascertained by the conviction the Court will not enquire when it was fixed, for if determined at any time before the conviction is formally drawn up and returned, that is sufficient: *Paley on Convictions*, pp. 271, 424, citing 2 Ld. Raym. 1514, where it is said, "If a *certiorari* came to them (the Justices) they might proceed to set a fine, and complete their judgment, and it would be no contempt."

The fourth objection is, that the original memorandum of conviction shews that it was made by three Justices, and if it did not provide for imprisonment in default of payment, as it did not, the three Justices should have joined in issuing the warrant of commitment, and one of them alone could not do so.

What I have said as to the third objection applies to some extent also to this. A conviction regular in form has been returned upon a *certiorari* directed to the Justice by whom it is supposed to have been made. There is no affidavit that it was in fact made by more than one Justice, but the memorandum of conviction purports to be signed by three. If it had been made by three Justices, the defendant, who knew of the existence of the memorandum when he applied for the *certiorari*, should have had the writ properly directed to all of them. By directing it to one only, he affirms that the conviction was made by one Justice, and cannot now be heard to raise the objection that it was made by three. So far as the precise objection taken by the rule is concerned, it is enough to say that the only conviction of which there is any evidence, is that which has been returned upon the writ.

The fifth objection, that the magistrate refused to

receive the evidence of the defendant, or any evidence on his behalf, is not supported.

I think the rule must be discharged, with costs.

Rule discharged, with costs.

LONGHI V. SANSON.

Lease—Proviso for termination—Negative and affirmative covenants—Overholding Tenant's Act.

The defendant leased from the plaintiff the "refreshment room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment room," and that if he "should fail, refuse, or neglect to carry out the terms of the lease, then that the lessee should, if required by the lessor, quit, leave, and absolutely vacate the premises, and the lease should terminate." The learned Judge of the County Court of York found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession under the Overholding Tenant's Act, R. S. O. ch. 137.

Held, affirming the decision, that the sale was a contravention of the lease: that the proviso for termination of the same extended to negative covenants; and that the lease was therefore forfeited, and a right of entry accrued to the lessor, and that it was a case coming within the Overholding Tenant's Act.

THIS was an appeal from the Judge of the County Court of the county of York.

The case arose under the Overholding Tenant's Act, and the order of the learned Judge was that a writ should issue to the sheriff to place the landlord in possession of the premises in question.

The lease, under seal, made on the 9th of August, 1881, for four years, at \$2,000 per annum, payable monthly in advance, was of the refreshment-room and apartments therewith connected, forming part of the Grand Trunk Railway Company's station or building in the city of Toronto, in Sarnia, and Stratford.

The lease was made subject to a variety of "conditions and stipulations," among which was one that either party might terminate the lease by giving to the other notice in writing of his intention so to do, and thereupon at the expiration of three months the lease should terminate; the manager of the Grand Trunk to have power to establish the price to be charged for refreshments to be sold on the premises.

The leased refreshment-room was on all occasions to be open to the public at least one hour before the arrival or departure of trains at the depot.

The refreshment-room was to be kept during winter well and sufficiently heated.

No spirits of any kind were to be sold or allowed in any shape or form whatever in the said refreshment-room.

Ale, beer, or claret might be sold by the glass, they being the only articles allowed to be so sold. Wines, other than claret, might be sold on the said premises by the bottle to passengers, but could not be drunk on the premises.

All refreshments and articles of every nature and kind sold on the said leased premises were to be of the very best kind.

Lastly, it was specially covenanted and agreed by and between the parties that should the lessee fail, refuse, or neglect faithfully and rigidly to carry out the terms of the said lease and each of them, then any such failure, refusal, or neglect should operate to waive any three months' notice, and the lessee should instantly upon such failure, refusal, or neglect, if so required by the lessor, or by the Grand Trunk Railway Company, quit, leave, and absolutely vacate the said premises, and the said lease should terminate.

Before the learned Judge of the County Court it appeared there had been spirits sold in what was called the bar-room, part of the demised premises.

The learned Judge was of opinion the bar-room was the refreshment-room, that the lease was broken, and that the tenant should be ousted.

The proceedings were removed by *certiorari*.

The case came before Wilson, C.J., sitting for the full Court, on the 30th of November last.

O'Sullivan, for the tenant, contended: 1. That a case of forfeiture was not within the Act: R. S. O. ch. 137. 2. There was no right of re-entry, for the covenant was negative only. 3. That the sale of spirits in the bar-room was not a sale in the refreshment room; the refreshment-room was in fact the dining-room, and there had been no sale in it. He referred to *McLaren v. Kerr*, 39 U. C. R. 512; *Cole on Ejectment*, 403; *Woodfall on Landlord and Tenant*, 12th edition, pp. 23-29; *Doe d. Henniker v. Watt*, 8 B. & C. 308; *Doe d. Willson v. Phillips*, 2 Bing. 13; *Evans v. Davis*, L. R. 10 Ch. D. 747; *Gilbert v. Doyle*, 24 C. P. 60; *Crawley v. Price*, L. R. 10 Q. B. 302.

Falconbridge, contra. The proviso against selling spirits in the refreshment-room is a condition, not a mere covenant which would require to be fortified by a proviso for re-entry for the breach: *Doe d. Lockwood v. Clarke*, 8 East 186; *Woodfall on Landlord and Tenant*, 11th ed., 283; *Doe d. Henniker v. Watt*, 8 B. & C. 308; *Doe d. Davis v. Elsam*, Moo. & Malk. 189, cited in *Doe d. Wyndham v. Carew*, 2 Q. B. 317. As to forfeiture on breach of a negative condition, the cases turn on the word "perform." Here the expression is to "carry out." He referred to *Croft v. Lumley*, 5 E. & B. 647; *Woodfall*, 11th ed., 287 (n); *Wadham v. Postmaster-General*, L. R. 6 Q. B. 648; *West v. Dobbs*, L. R. 5 Q. B. 464; *Platt on Leases*, vol. ii., 324; *McIntosh v. Samo*, 24 C. P. 625, and cases there cited. The refreshment-room is clearly the bar-room. Etymologically the word is more applicable to liquids than to food: (the French verb *rafraichir*, to cool, to allay heat).

December 16, 1881. WILSON, C. J.—The statute, R. S. O. ch. 137, provides that "in case a tenant, after his lease or right of occupation has expired or been determined, either by the landlord or the tenant by a notice

to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuse, upon demand made in writing, to go out of possession," the landlord may apply, &c. Where a forfeiture happens and the right of re-entry is claimed, and a demand is made in writing upon the tenant to go out of possession, it is a case "in which the lease has been determined by the landlord pursuant to a proviso in the lease;" or it is a case in which the lease "has been determined by any other act whereby a tenancy may be determined," and after such forfeiture and demand, if the tenant refuse to leave, he "wrongfully refuses upon demand to go out of possession."

I am of opinion when the tenant refuses to go out of possession, in such a case it is a ground of and for procedure under that statute.

The lease provides by a condition and stipulation that "no spirits of any kind shall be sold, or allowed to be sold in the said refreshment-room," and the lessee covenanted that if he "should fail, refuse, or neglect to carry out the terms of the lease, then the lessee shall, if required by the lessor, quit, leave, and absolutely vacate the premises, and the lease shall terminate."

It is of no consequence whether a condition or covenant is affirmative or negative. The remedy for an observance of it may be enforced by re-entry equally in either case, if the right to re-enter is so expressed as to apply as well to negative as to affirmative covenants: *Wadham v. Postmaster-General*, L. R. 6 Q. B. at p. 648. Nor is it of any consequence whether the words in this case are in the form of a *condition*, or of a covenant or agreement, because there is a right of re-entry, or at any rate a right to put an end to the lease, given to the lessor. *Upon condition, provided always, so that*, respectively, amount to a condition: *Co. Litt.*, secs. 328-9. *That if it happen*, will not constitute a condition "without the words that it shall be law-

ful for the feoffee to enter, &c.: Secs. 330, 331. See also *Doe d. Henniker v. Watt*, 8 B. & C. 308; *Doe d. Willson v. Phillips*, 2 Bing. 13; *Crawley v. Price*, L. R. 10 Q. B. 302.

I think there is a power of re-entry here, at any rate a right to recover possession, under the words that the lessee shall, if required by the lessor, "quit, leave, and absolutely vacate the premises, and the lease shall terminate," whether the words of obligation be in the form of condition or of covenant.

Here the words are as well words of condition as of covenant. The lease was made "subject to the following conditions and stipulations," and the lessee was to abide by and conform to all the terms, covenants, conditions, stipulations, and restrictions to which the lessor is bound in the agreement with the Grand Trunk in respect of the said premises; and then these terms, &c., are set out as before stated; and then follows the special clause that in case the lessee should fail, &c., as before stated.

The enquiry then is, whether the words of the lease apply to negative as well as to affirmative covenants.

The words here are, that should the lessee "fail, refuse, or neglect, to carry out the terms of the lease or any of them," then, &c.; and the term in question is that "no spirits of any kind shall be sold or allowed to be sold in the refreshment-room."

In *Doe d. Palk v. Marchett*, 1 B. & Ad. 715, the covenant was not to allow alterations on the premises, and the proviso for re-entry was in case the tenant made default in performance of any of the covenants, and it was said by Lord Tenterden, C. J., such language "seems properly applicable to affirmative covenants, though I believe there have been cases where the expression 'make default' has been applied to negative ones also." There were special circumstances which affected the decision of the Court.

In *Croft v. Lumley*, 5 E. & B. at p. 671, on similar language Campbell, C. J., said: "Assuming the parties intended to point to default in performance of any covenant, positive or

negative, what other words could they have used to express that intention?" See also at p. 679, where the Chief Justice said that such words did apply to a negative covenant.

In *Hyde v. Warden*, L. R. 3 Ex. D., at p. 82, it is said: "Moreover we should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct, that the power of re-entry being only in the event of the lessee 'wilfully failing or neglecting to perform any of the covenants,' does not apply to a breach of a negative covenant," referring to *West v. Dobb*, L. R. 5 Q. B. 460.

In *Evans v. Davis*, L. R. 10 Ch. Div. at p. 757, Fry, J., said: "In almost every lease the proviso for re-entry is expressed to be in the event of the 'non-performance or non-observance' of any of the covenants. I have always understood that 'non-observance' refers to the negative covenants, and 'non-performance' to the affirmative covenants."

In *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299, the right of re-entry was given if the lessee should do, or cause to be done any act, matter or thing contrary to and in breach of any of the covenants; and it was held not to apply to a breach of covenant to repair, the *omission* to repair not being an act done.

Applying these cases as rigidly as their language expresses the law so laid down to be, it is certain there is here a negative covenant, "no spirits shall be sold," &c. Then, do the words of forfeiture, that should the lessee "fail, refuse, or neglect, to carry out the terms of the lease," create a vacancy of the premises, and terminate the lease? The important words here are, "fail to carry out." Fail to *perform*, would not, it is said, although it is not perfectly clear, avoid the lease, because that word has relation to an act to be done. Fail to *observe* or *keep* the terms would in my opinion be words which would extend to a negative as well as to an affirmative covenant, and fail to *carry out*, though somewhat equivocal, may be considered as an expression of the like meaning and application.

If it were provided that in case the lessee *failed* in any

of his covenants, that, I think, would extend to both classes of covenants. Fail to carry out is no more than to fail in carrying out: it does not mean only that the lessee is to do an act; it means as well that he is not to do what he may have engaged he shall not do.

The last point of argument is, whether the sale of spirits in the bar-room was a sale in the refreshment-room. The demise was of "the refreshment-room and apartments therewith connected." The landlord says the refreshment-room is the bar-room, and the other apartment therewith connected is the dining-room. The tenant says, the refreshment-room is the dining-room, and the other apartment is the bar-room, and that there has not, therefore, been any ground of forfeiture.

Looking at the words *refreshments*, and *refreshment-room*, as they are used in the lease, I understand by them that the term *refreshments* applies to food and drink, and *refreshment-room*, to the room in which such articles are furnished to the customers.

I do not see any inconsistency in holding, if necessary, that in this lease the refreshment-room applies to both the dining-room and the bar-room, and therefore I do not differ from the opinion of the learned Judge of the County Court upon this point.

Upon the whole, I am obliged to dismiss the application, with costs.

Judgment accordingly.

THE UNION FIRE INSURANCE COMPANY V. LYMAN.

Statement of defence—Contents of paragraph in—Rule 128—Calls on stock—Allotment—Vesting of shares.

Though each paragraph of a statement of defence should under Rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence.

Claim : Calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence : By a by-law of the plaintiff company no subscribers of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made.

Held, on demurrer, bad ; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vic. ch. 93, sec. 2, (O.,) the plaintiff company's Act of incorporation.

Statement of claim for calls on shares, ten per cent. on the same having been paid at the time of subscription.

Statement of defence.

2. By by-law of the company it was provided that no subscriber for stock should be a shareholder in or entitled to stock in the company until the same should be allotted to him by order of the Board of Directors ; and the by-law was at the time of the subscription for shares, and still continued in full force as one of the by-laws of the company.

3. Benjamin Lyman in his lifetime subscribed for fifty shares of the stock, or any portion thereof which might be allotted to him by the Board, but no allotment of the fifty shares, or of any share, was ever made to him by order of the Board, and the said Benjamin Lyman never became or was a shareholder, or the owner or holder of any shares or stock of the company.

Demurrer to second paragraph, because it was not alleged that no stock was allotted to Benjamin Lyman by order of the Board ; and because, by the act of the company, the said Benjamin Lyman became a shareholder individually upon subscribing for the stock ; and to the second and third paragraphs, because by the act the said Benjamin

Lyman became a shareholder immediately upon subscribing for the stock, and no allotment was necessary unless the Board was only able to give to him a portion of the shares subscribed for.

November 29th, 1881. *A. C. Galt*, for the demurrer.

The second paragraph is not a ground of defence by itself, and it requires the third paragraph to be read in connection with it to constitute a good answer. There was an action by the same plaintiffs, in which Cameron, J., gave judgment for the company on the like pleadings; but in that case the defence of the want of a by-law was not raised. As to by-laws as applicable here, he referred to *Harr. Mun. Man.*, 211 and notes.

MacLennan, Q. C., contra.

The 39 Vic. ch. 93, sec. 2, O., is the Act which applies here. The liability of Benjamin Lyman is just as it has been stated in the third paragraph of defence, that he "subscribed for 50 shares of stock or any portion thereof as might be allotted to him by the board," but no allotment was made to him. There is no part of the Act inconsistent with the defence set up.

January 10, 1882. *WILSON, C. J.*—The formal objection to the second paragraph of the statement of defence is not, I think, maintainable. I do not understand that each paragraph of the statement must present a ground of defence in and by itself.

Rule 128 provides that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, * * * such statement shall be divided into paragraphs numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate allegation."

The pleading is to be a statement and the statement is to be divided into paragraphs, and each paragraph to contain (as nearly as may be) a separate allegation, but it is not said a separate defence.

The narrative necessary to be given must carry forward the defence by some matter or matters which constitutes or constitute an allegation to be contained in each paragraph. Here the second paragraph states that by a by-law no subscriber for stock was to become a shareholder until the same should be allotted to him by the Board of Directors. That is an allegation not of much consequence as it stands by itself; but it carries forward the defence in the following paragraph, which states that the shares in question were not allotted to the subscriber under the by-law, and he therefore never became a shareholder.

I do not think the second paragraph was rightly demurred to, although the whole defence contained in the two paragraphs might as well have been in the one, and they might have been so without any confusion, and it was against confusion in the statement either of claim or defence the rule was framed.

The statute referred to by section 2 vested the shares subscribed for in the subscribers. By section 5 the Provisional Directors were "authorized to receive from the shareholders a deposit of ten per centum of the amount of the stock subscribed by such persons respectively;" and by section 6, so soon as \$50,000 of the stock was subscribed and ten per cent paid in, a board of directors was to be appointed.

The declaration shews the testator, Benjamin Lyman, subscribed for fifty shares and paid in ten per cent, and it appears a Board of Directors, necessarily superseding the Provisional Directors, was elected, under whom the business of the company has been carried on.

The pleadings shew the ten per cent. was paid by the testator at the time he subscribed for the stock, and that the by-law relied upon by the defendant was in force at the time of his subscription. There is nothing inconsistent with the act of incorporation in there being such a by-law.

The by-law, according to the defence, provided that no subscriber for stock should be a shareholder or entitled to stock until the stock was allotted to him by an order of

the Board, and that no allotment was ever made to the testator of any shares by order of the Board. That is a valid by-law. It is the fact of the testator having paid the ten per cent. upon his stock, which has never, as I infer from the pleadings, been repaid to him, and for and in respect of which sum he has a claim of some kind or other to the return of the ten per cent., as not being a shareholder, or to exercise his rights in respect of the ten per cent. paid, as being a shareholder, which raises any substantial question upon this demurrer.

The company having kept the ten per cent. is evidence to some extent, as well as the fact of the subscriber not having claimed it, that the fifty shares were allotted to him. The by-law does not extend to a case in which the person who, while he subscribes, also pays the necessary deposit, which, in this case, was a considerable sum of \$500. It merely provides that a subscriber shall not, without allotment, become a shareholder, which may have been intended to exclude subscribers who did not or could not pay the required deposit.

I have had some doubt in this case; but I think the question of law is with the plaintiffs.

It may be there is more that could be shewn which would remove all doubt in this case one way or the other; but with that I have nothing to do. If my opinion had been the other way the plaintiffs would have taken issue in fact, and perhaps amended their pleadings, and the trial would then have been, as it may be yet, upon the facts. I must give judgment for the plaintiffs, with costs.

Judgment accordingly.

RE MISENER V. THE TOWNSHIP OF WAINFLEET.

Municipal Act—Drainage by-law—Withdrawal of petitions—Alteration in work petitioned for.

A petition was presented under section 529 of the Municipal Act for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefited by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream, and some by informing the council that they would dig their own drains. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, shewing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law.

Held, that the by-law should be quashed; for (1) the council had no power to authorize the undertaking of any work other than that petitioned for, and if that was impracticable or too costly they should have refused the petition; (2) the petitioners had the right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, i.e., while the council had control of the matters, the preliminary surveys and estimates being as much for the information of the petitioners as of the council; (3) a sufficient number of petitioners having withdrawn to reduce the number below the majority of those to be benefited, the by-law untruly recited that a majority, &c., had petitioned.

December 6, 1881. *Clement*, on behalf of Matthias Misener, a ratepayer of the township of Wainfleet, moved on notice to Edward Lee, Reeve of said Township, and John Henderson, Clerk of the same, to quash by-law No. 233 of that township, passed on or about the 25th of October, 1881, on the following grounds:

1. That the majority in number of the persons as shewn by the last revised assessment roll to be the owners of the property to be benefited under the by-law, did not petition the Council to pass the same or to have the lands or any part thereof in the by-law set forth drained.

2. The by-law was not drawn in accordance with the form given in the statute in that behalf, viz., section 530 of the Municipal Act.

3. That the lands described in the by-law and the lands set forth in the petition asking for the drain, and on which petition the by-law was founded, and which petition was dated the 6th of August, 1879, were not identical, and there was therefore no petition whereon to found the by-law.

3. The said petition asked for the cleaning out of Little Forks Creek from the line between the township of Moulton and Wainfleet, running east as far as might be found necessary to give a sufficient fall to the water; and the by-law provided for the construction of a ditch from the centre of lot 44 in the seventh concession to the side road between lots 32 and 33 in the said concession, so that the petition and by-law did not correspond, and there being therefore no petition to found the by-law upon, the by-law was bad.

The petition of the 6th of August to the township council represented it to be by a majority in number of the persons interested owning lands in the vicinity of Little Forks Creek. It prayed the council would cause the creek to be cleared out, commencing at the town line between Moulton and Wainfleet, running east as far as might be found necessary to give a sufficient fall to the water, and would employ an engineer or other competent person to take a level and make a reasonable estimate of the proposed improvement, and charge the lands to be so benefited in proportion to the amount of the benefit to be received by each party interested; and that the council would pass a by-law to carry the same into effect, making the charge payable in one or more years, as in the judgment of the council would be most easy for the land owners to meet. It was signed by 18 persons.

The report of Mr. Law, who made the survey, was not filed.

On the 5th November, 1879, a petition was sent to the council signed by 29 ratepayers of the township, rep-

representing the expense of the work, according to the survey and estimate, to be very great and too heavy for them to bear; and representing that if the logs and some other obstacles were removed out of the channel of the stream, giving free course to the water, and which could be done with very little expense, that they thought no one would suffer by being overflowed; and that it would relieve the petitioners and ratepayers from a great burden of taxes. Three of the eighteen who signed the first petition, signed among the twenty-nine of the second petition. Two more of those who signed the first petition in effect withdrew their names from it, by saying, "This ditch is far beyond my expectations, I wish to dig my own."

On the 18th October, 1880, a petition signed by eleven owners of land in the vicinity of Little Forks Creek, prayed the council to pass a by-law giving the owners of land from the west side of lot No. 37 to the east side of lot 33 power to do their own part of Forks Creek, and they would give a sufficient outlet to the creek. Nine out of the eleven were subscribers to the second petition; that is, the one of the 5th November, 1879.

On the 29th October, 1880, eight subscribers interested in the contemplated work on Little Forks Creek, represented the work would impose a heavy taxation upon them, which was not necessary, as they were willing for the sake of saving further expense to do volunteer work upon the ditch. Of these eight, one signed the 1st and 2nd petitions; three besides signed the 1st, and four besides signed the 2nd petition. On the 13th of July, 1881, seven of the persons interested in the work petitioned the council that rather than the work should not be done, they were willing to add their names in favour of it, providing the work were let out in sections to the lowest bidder by auction. Of these seven, five had signed petitions two and three, and two petition three.

Among the defendant's exhibits were the following: Petition, 8th October, 1881, by twenty-two ratepayers and land owners along Little Forks Creek, stating that they

were aware the Council was about to pass a by-law for draining the creek according to a survey made by Mr. Law, and they expressed their earnest and decided wish that the council should abandon all proceedings under the by-law, as they claimed it would be both illegal and unjust. Of these twenty-two, four had not signed any former petition; the rest had signed one or more of the former petitions. Of the eighteen who had signed the original petition for the work three had withdrawn by the second and sixth petition; two had withdrawn by their notice in writing to the council; two by the fourth petition, and one by the fourth and sixth petitions.

The defendants also filed a resolution of the council of the 1st of September, 1880, stating that the council had considered the advisability of constructing the Little Forks ditch petitioned for by Wm. Schwab and others (*i. e.*, the first petition) from lot 33 to the township line between Wainfleet and Moulton, and having, under the petition, had the necessary levels taken, estimates and profile made by Henry Law, a person qualified for such work, and that the land owners west of lot 33, in the 7th concession, had petitioned the council against extending the drain further west than lot 44, because the wet lands west of it could be more cheaply drained by way of Wolf Creek, and the latter opinion was confirmed by the survey and report of H. T. Ross, and that as the petitioners east of lot 44 were most anxious that the work be proceeded with at once, at least as far west as lot 44, therefore it was resolved that the reeve should be directed to instruct Mr. Henry Law to ascertain if the drain terminated at lot 44, whether the size of the ditch could be reduced and the expenses lessened, and if it should be found the size of the ditch could be reduced and the expenses lessened, the engineer was authorized to make a new assessment and take in all lands that in his judgment would be benefited by the construction thereof. An assessment of the different owners was made, dated in September, 1880. There were 33 owners, and the total value of the improvement that would be made by the

work was estimated at \$2,488. A provisional by-law (233) was adopted on the 16th of September, 1881, to take effect on the 25th of October thereafter, on which last day it was finally passed. The day before the by-law was opposed, the present applicant, by his counsel, attended at the council meeting to oppose, and he did oppose the passing of the by-law, and he was then informed by the council that the by-law was based only upon the petitions of the 6th of August, 1879, and the 13th of July, 1881, petitions numbered above as one and five. The title of the by-law was "An Act to provide for the construction of a ditch for the drainage of certain wet lands lying between the centre of lot 44 in the 7th concession, and the side line between lots 33 and 32 in the latter concession of the township, and for borrowing \$2,788 on the credit of the municipality for completing the same." It recited that a majority in number of the owners of the property to be benefited by the drainage had petitioned the council, praying that an engineer might be employed to examine and report upon the cost of the ditch: that the council caused an examination to be made of the locality by Henry Law, P. L. S., and procured plans and estimates of the cost of the work, stating the proportion to be levied as a general rate for the benefit of roads, and the proportion which in his opinion should be paid by the owners or be levied on their lots directly benefited, and that the council were of opinion the drainage would greatly benefit the said locality.

It was therefore enacted, 1. That the reports, plans, and estimates be adopted, and the drain should be made in accordance therewith; 2. That \$2,788 should be raised by debentures, payable, &c.; 3. That \$2,488 be charged against the lands benefited, (other than roads) and be collected by a special rate annually for ten years; 4. That \$300 be charged for roads, &c.

The applicant made affidavit, that after the petition of August, 1879, was sent and report made thereon, the council did nothing upon the petition till June, 1880, when they agreed to employ another engineer, and to begin the

matter over again; and nothing was done after that by the council till July, 1881, when the petition of that date was sent in: that the number of those who signed the first petition of August, 1879, was eighteen, but six of those names were the names of persons not named in the schedule of names of persons whose property would be benefited by the work; and the number of those who in July, 1881, desired to have their names to the petition for doing the work under certain conditions, was seven; but two of that number were not named in the said schedule of persons whose property would be benefited by the work, making only seventeen in favour of the work, if the names on the petition of July, 1881, could be lawfully added to the petition of August, 1879; and there were only thirty-six names on the schedule.

[The schedule contained forty names, but some of these were mentioned a second or third time, so that seven of such names had to be deducted, leaving of the different persons thirty-three, of which seventeen was the major number.] The applicant swore that in October or November of 1880, the council finding a majority of those who would be benefited by the work had not petitioned for the work, agreed to drop it. [Several others swore to the same fact.]

Lorenzo D. Misener also swore he had already made his own ditch, and a number of those residing near him had made at least three miles of the ditch.

John Dills swore that after the council declared the matter was dropped, he made his own part of the ditch, which he would not otherwise have done; and that many thus constructed their portions of the drain.

Besides the two documents before mentioned, the petition of October, 1881, and the resolution of the council of September, 1880, the council filed the following affidavits:

Edward Lee, the Reeve of the Township, and who had been so six years, said that upon the petition of August, 1879, Mr. Law was appointed to survey and report; that before his report the council reduced the length of the work

and the width of it, thereby saving about \$1,900, and reducing the number of persons to be taxed therefor: that the council, thereupon, passed the resolution of September, 1880, before mentioned, and they believed they were acting in the interest of those who signed the petition of August, 1879, but also in the interest of those who signed the petition of November, 1879: that after Law had made his second report, the council believed the drainage of a portion of the locality would be desirable, and they caused the by-law 233 to be published: that the council did not at any time agree to drop proceeding upon the petition, nor did the council ever declare the petition had not the majority of persons requisite to support it: that until the petition of 8th October, 1881, was received he, the defendant, was not aware that any real opposition was intended to be made against the passing of the said by-law: that in that petition there were six names which were not in the schedule as persons interested: that there were only thirty-three persons named in the schedule as persons interested, and of that number thirteen signed the first petition, and six the petition of July, 1881, making nineteen persons who had petitioned in favour of the by law: that on the 1st of September, 1879, the council, on receiving the first petition, passed a resolution describing it as the petition of William Schwab and *thirteen* others, being a majority in number of the parties interested from the allowance of road between thirty-seven and thirty-eight westward to the line between Wainfleet and Moulton, had petitioned the council that the reeve should be instructed to employ Henry Taylor, P. L. S., to take the necessary levels and to report to the council.

John Henderson, the Clerk of Wainfleet, stated that on receipt of the first petition the council satisfied themselves that the majority of the residents and non-residents, as shewn by the last revised assessment roll, had signed the petition in respect of the property to be benefited: that Mr. Henry Law, P. L. S., was employed to survey, and upon his report the council reduced the work and the

number of persons to be taxed therefor; that at the court of revision, held after the passing of the by-law, the applicants and others now opposing the by-law were present and made no objection to the assessment. In other respects his affidavit was similar in effect to that of the reeve.

Another member of the council since January, 1880, stated that at the court of revision, the applicant, who was present, did not, nor did any one else, oppose the assessment made, and the council never agreed to drop the petition.

Joseph Eagan said that the petition was not agreed to be dropped: that the opposition to the by-law proceeded from a few who were not willing to pay for the work: that many of those opposing the proceedings declared they were willing to join in the work if the price were reduced, and it was reduced by about \$1,900.

W. H. Schwab, also said that the petition was not agreed to be dropped: that the applicant and others, upon Mr. Law's first report, said if the expense were reduced they would be perfectly satisfied.

George Steward said that the council did not drop the petition: that he heard many say who were opposing the by-law they were willing to pay if the price were reduced, which price the council did afterwards reduce.

Alpheus R. Muir said the council did not drop the petition: that no one opposed the assessment at the Court of Revision.

John Misener said he had been acting Reeve since 1880, and he was not aware that any decisive action was taken by the council to stay proceedings upon the petition.

The deponents all agreed that the work would be of great public benefit, and that a majority of those to be benefited had concurred in its being done.

Bethune, Q. C., and Rykert shewed cause, and *Clement* supported the motion.

January 10, 1882. WILSON, C. J.—The original petition of the 6th of August, 1879, was signed by eighteen persons, for the construction of a drain from about the town line between Wainfleet and Moulton, in the 6th concession, as far east as should be necessary to give a sufficient fall to the water.

There is not one of the three different reports made by the surveyor before me. What they did report I do not know. The council in their resolution of the 1st of September, 1879, speaks of there being a majority of those interested in the work from the line below 37 and 38 westward to the line between Wainfleet and Moulton. Whether that was the eastward limit of the proposed work or not, I do not know. I think something of that kind was mentioned on the argument, and that the council afterwards continued the work eastwardly to the limit between 33 & 32, and struck out the portion of it south of lot 44 in the 7th concession. The cost of the work nowhere appears. It does appear that in ten years' time, \$2,778 has to be paid; and it appears that by the changes which the council made in the work, by taking off the portion south of lot 44, which has a natural fall to the south and not to the east, a saving of \$1,900 was made in the work, even by the addition at the east of carrying the drain across five other lots, because the ditch from the point near the line of the two townships northerly to lot 44 in the 7th concession, would have been work against the natural formation of the country, or would have been draining the land up hill, necessitating deep cutting to overcome the contrary incline.

Whether the council can alter the works which the petitioners ask for, unless it may be under sect. 529, sub-sec. 6, and change it into something they do not ask for without their subsequent express concurrence or acquiescence, at least, so as to constitute an assent to it, is more than doubtful.

I should say if the petitioners ask for something which is not found by the council to be necessary or very practicable, or too costly, the council cannot change the work or improvement asked for of their own motion.

They should refuse the petition, and suggest how far and in what way they can meet the wants of the petitioners, and leave it for them to take further action, as they may think proper.

If the council can act as they please when a petition is put in, they might build a bridge in place of a culvert, or drain in a contrary direction to that desired, and so bring in new persons and alter the expense to the prejudice of the petitioners.

I am not inclined to interfere in this case, because the portion south of lot 44 has been dropped because it is plainly a part of the work which could not be carried out properly with the rest of the work. The part south of lot 44 has its fall to the south and not to the east, while the rest of the work has its fall to the east; and because also there has been a great saving effected by not attempting to drain up hill; and because there is evidence of a kind of acquiescence, although not of the quietest kind, in what was going on, and the work is one of great public benefit.

It is said the council had never at any time a majority in favour of the work, or if there was a majority at first, that such majority was withdrawn before the work was done; and that it should not have been further proceeded with. I have no doubt a petitioner for a work of this kind can withdraw from his petition at some time or other after subscribing it. Up to what time may he withdraw? The Municipal Act, sec. 529, provides that on the presentation of a petition to the council by the majority in number of the persons, as shewn by the last revised assessment roll to be the owners of the property to be benefited by such work as was required to be done in this case, the council may procure an examination to be made by an engineer or provincial land surveyor of the locality proposed to be drained; and may procure plans and estimates to be made of the work by the engineer or surveyor of the real property to be benefited by such works, stating as nearly as may be in his opinion the proportion of benefit to be derived by such work by every road and lot or portion of lot; and if the

council is of opinion that the work or a portion thereof would be desirable, the council may pass by-laws to carry out the proposed work.

The estimates of the cost of the work and the assessment to be made of the real property that will be benefited, and the proportion of benefit that will be derived by each lot or part of lot, are made as much for the information and service of the petitioners and others interested in the work and in the cost of it as of the council; and it seems to me to be clear that the petitioners, or any one or more of them, upon the report of the engineer or surveyor may, if of opinion the work is too costly or will bear too heavily upon them or upon any of them, abandon the project and withdraw from the petition; because the preliminary examination, estimate, assessment, and value of supposed benefit, are made to enable the parties to determine whether they will proceed with the proposed work or not.

If the petitioners or any of them withdraw from the petition, they must pay their proportionate share of the expense which has been incurred up to that time if the work is abandoned, or if the withdrawal has the effect of reducing the number of petitioners below the number necessary to give it effect so that the petition falls through. If, however, notwithstanding such withdrawal of one or more of the petitioners, a majority of the owners still maintain the petition, the dissentients may be opponents, but the work will go on.

Now, I think the right to stay all action upon the petition, or of any one or more of the petitioners to withdraw from it, must continue so long as the proceeding is still incomplete, that is, up to the time at which the contract for the works is entered into, or until the debentures have been negotiated, or the money has been raised for the prosecution of the work; for after either of these periods the council can no longer undo of themselves that which has been done upon the faith of the petition and the act of the petitioners.

But until such time, that is, before the council has lost

control of the matter, I am of opinion the work may be wholly abandoned, or the petitioners may secede from their subscription, which may necessitate an abandonment of the work. In either of these cases the parties who have induced the expense to be incurred must pay for it.

But if the secession of a certain number from the petition still leaves a majority remaining of the owners of property, the secession will have no effect.

In this case the debentures proposed to be issued have not been issued, so far as I am informed, nor has any contract been made by the council for the performance of the work. The whole matter is still in the hands and control of the council, and matters can be put just as they were by the mere action of the council itself, so soon as those who induced the expense already incurred to be incurred have made good the sum to the municipality.

How then are the facts? Was there a majority to the petition of the 6th of August, 1879?

There were eighteen petitioners, and that was a majority in favour of the works then prayed for.

By the petition of the 5th of November, 1879, sent in after Mr. Law's first report, Andrew Frank, D C. Holmes, and Elisha Dills, named in the original petition, and many others not named in it, desired the creek merely to be cleared from logs and obstructions, so as to give free course to the water, that is, to give up the work applied for in the original petition, on account of the great expense of the projected work according to the report of Mr. Law.

Then some time after that, but the exact time I do not know, as the notice is not dated, George Sutherland and William Sutherland, parties to the original petition, informed the council they would dig their own drains. These five persons being removed from the eighteen named in the original petition reduced the number to thirteen.

By the petition of the 29th of October, 1880, Hamilton Johnson, John Schwab, and Annie Schwab, also parties to the original petition, on account of the expense of the contemplated work, desired to do the work themselves. That reduced the thirteen to ten.

By the petition of 13th July, 1881, seven of the interested residents desired to add their names to those who were in favour of having the work done, on condition that it should be let in sections by auction to the lowest bidder. I do not notice that condition. That addition increased the ten to seventeen.

Then, in the assessment made against those who will be benefited by the work, the names of William Schwab, Jacob Sorge, Joseph Egan, Thomas Vigrass, George P. Moore, and James Blackwell, are not contained, although contained in the original petition. They are not therefore persons who will be benefited by the work. The deduction of these names from the above seventeen will reduce the number to eleven of those who are in favour of the work, which number of eleven consists of only four of the original petitioners, and of the seven whose names were added by the petition of July, 1881.

That number is by no means the majority of the thirty-three who are named in the assessment as the persons who will be benefited by the work.

The by-law does not therefore recite the fact when it states that "a majority in number of the owners of the property to be benefited by the drainage, has petitioned the council praying that an engineer be employed to examine and report upon the cost of the ditch."

If the work is abandoned now, I do not see what harm can happen to any one. If the parties who put the council to this expense indemnify the municipality, as they must do, matters will be just as they were. The work will not go on unless a majority makes petition for it, and if they do not petition it is their own business, and of that they are themselves the best judges.

If any of the parties have since done their own drainage they will get the benefit of it upon a new assessment, and it is possible something may have been said in the council, in the fall of 1880, about dropping all further proceedings, which led these persons to do their own work, because John Misener, the deputy reeve, in his affidavit only says

that no "*decisive action*" was taken by the council to stay proceedings;" but it may be there was nothing so definite about staying further proceedings altogether as some of the deponents state.

I am of opinion the by-law should be quashed, as it is of great consequence that works of the nature prayed for should be performed clearly upon the request and at the instance of a majority of the persons who are to be rated for it, when the result of it is to bind unwilling and opposing parties, and non-residents as well as residents.

I do not quite understand why the council should have taken any trouble about the matter in the face of the different petitions, and of some opposition, more or less, to it, unless upon the most convincing proof that they were forwarding the desire of a manifest majority.

As nothing has been done upon the by-law, and no special injury can be done to any one, it is better to stay all further action upon it, and leave those who have led the council to incur the expense they have been put to to make it good to the municipality, who did at the instance of the subscribers only what was asked to be done for their own purpose and benefit.

I must make a rule quashing the by-law, with costs.

Judgment accordingly.

UNION FIRE INSURANCE COMPANY V. LYMAN.

Insurance company—Action for calls—Suspension of license—Business of insurance—Demurrer.

Statement : Call on stock. Defence : That by an order of the Lieutenant-Governor of Ontario in Council, issued under 42 Vic. ch. 25, the plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario ; and that the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario.

Held, on demurrer, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. ch. 160, sec. 34, and 42 Vic. ch. 25, sec. 3, sub-sec. 7 ; but an amendment was allowed, this point not having been taken, and, *Held*, that the defence was good, for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts.

ACTION for a call on stock.

Amended statement of defence (a) :

1. That, since the statement of defence, and on or about the 19th of November, 1881, by an order of the Lieutenant-Governor of Ontario in Council, issued pursuant to the powers conferred by the Act of the Legislature of Ontario, 42 Vic. ch. 25, the license of the plaintiffs had been and still continued suspended, whereby it became and was not lawful for the plaintiffs to do any further business in Ontario.

2. The calls in respect of which the action was brought were made for the purpose of enabling the plaintiffs to carry on the business of the plaintiffs in Ontario.

Demurrer: That the suspension of the license did not prevent the plaintiffs from suing for calls.

January 20, 1882. *A. C. Galt* for the plaintiffs.

MacLennan, Q. C., for the defendant.

The arguments appear from the judgment.

January 24, 1882. WILSON, C. J.—The statutes referred to were the 42 Vic. ch. 25, and the R. S. O. ch. 160. The defence should, I think, as a matter of pleading, have alleged the company had notice of the suspension of the

(a) See previous report of case, *ante* p. 453.

license by publication in the *Ontario Gazette*, or otherwise, for until then the company may still carry on their business : 42 Vic. ch. 25, sec. 3, sub-sec. 7 ; R. S. O. ch. 160, sec. 34.

There was no objection to the defence on that ground.

The argument was, whether the company may, notwithstanding the suspension of the license, enforce payment of their calls, although they may not carry on the business of the company by taking insurances or collecting premiums. The R. S. O. ch. 160, sec. 3, declares "it shall not be lawful for any insurance company to accept any risk or issue any policy of insurance, or receive any premium, or transact any business of insurance in Ontario, or to prosecute or maintain any suit, action, or proceeding, either at law or in equity, relating to such business, without first obtaining a license from the Provincial Treasurer to carry on business in Ontario." And sec. 34 enacts that "an order in Council may issue suspending or cancelling the license of such company, which shall then, during such suspension or cancellation, be held to be unlicensed."

These sections shew the plaintiffs cannot further maintain this action.

It was argued on behalf of the plaintiffs that, by section 19, the company were only, during suspension of the license, prevented from delivering a policy, and from collecting premiums, and from transacting any business of insurance, and not from proceeding for the recovery of calls ; and that the words, "and from transacting any business of insurance," did not cover or apply to an action for calls. They do not apply very distinctly to such an action ; but an action for calls is, I think, "transacting business of insurance."

The company are not allowed by their charter to carry on other than an insurance business, and they are allowed to sue for calls because that is a proceeding within the terms of their charter ; or, in other words, it is carrying on their insurance business ; and the statute forbids them, during the suspension of their license, from carrying on any business of insurance. If a company fail to pay their en-

gements their deposits in the hands of the Provincial Treasurer may be administered under sections 21 and 22 by the Court of Chancery through the means of a receiver. So when a company has ceased to transact business, and has given a written notice to that effect to the Provincial Treasurer, the business may be closed under sections 23, 24 and 25.

The defence pleaded is not in respect of a state of things under any of these sections. It is simply that the license authorizing the company to do business has been suspended, and it is now an unlicensed body, and incapable, in consequence of the suspension, of doing business, and that is a good defence. The statement of defence sets up that the company are suing for the calls in this action "for the purpose of enabling them to carry on their business in Ontario."

So that, assuming the plaintiffs' argument to be correct—that they may sue for calls, because that is not carrying on the business of insurance, as the money may be required to pay debts already incurred—the defendant has alleged that this money sued for is to enable the company to carry on their business, and that I must assume to be true for the purposes of this argument; but, as I have already said, the mere suspension of the license is a full defence to the action.

I cannot give judgment absolutely for the defendant on the present pleadings, because notice of the suspension has not been shewn to have been duly published or given to the plaintiffs.

I shall, however, allow the defendant to amend his defence in that respect, and then give judgment on demurrer for the defendant, but without costs.

Judgment accordingly.

RE SQUIER.

County Judge—Charges of misconduct—Enquiry by commission—Court of Impeachment.

Certain charges having been preferred against a County Court Judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 Geo. III. ch. 75, (Imp.,) and directing the commissioners to examine into the charges, and for that purpose to summon witnesses, and require them to give evidence on oath and produce papers; and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition.

Held, that enquiries under the Imperial Act should be made before the Governor-General in Council, and the authority could not be delegated, nor enquiry upon oath authorized by commission.

Held, also, that the commission could not be supported at common law, for it created a Court for hearing and enquiring into offences without determining.

The C. S. C. ch. 13, and 31 Vic. ch. 38 (D.), give power to issue commissions for inquiring into the administration of justice when the enquiry is not regulated by any special law, and an enquiry into the conduct of any one connected with the administration of justice is within the meaning thereof. But

Held, that this enquiry into the conduct of a County Court Judge falls within the exception in the Act, being regulated by C. S. U. C. ch. 14, secs. 1 and 4, which are a special law for such cases.

The 32 Vic. ch. 22, sec. 2 (O.); 32 Vic. ch. 26 (O.); 33 Vic. ch. 12, sec. 1 (O.), and R. S. O. ch. 42, sec. 2. assuming to repeal C. S. U. C. ch. 14, and C. S. U. C. ch. 15, sec. 3, and to abolish the Court of Impeachment for the trial of County Court Judges, and regulate their tenure of office are *ultra vires* the Provincial Legislature. The tenure of office of the County Court Judges is still regulated by C. S. U. C. ch. 15, sec. 3.

The different modes of proceeding against County Court Judges for misconduct pointed out.

January 24, 1882. *McCarthy*, Q. C., moved on notice, dated 17th January, 1882, on behalf of Wilmot Richard Squier, Judge of the County Court of the County of Huron, for a writ of prohibition, prohibiting David B. Read, Esquire, Q. C., the commissioner appointed under a commission of His Excellency the Governor in Council, issued under the Great Seal of the Dominion of Canada, dated the 22nd of December last, from proceeding to examine or report upon the matters and things charged against the said Judge, and from in any way proceeding under the said commission. The commission bore teste on the 22nd of December, 1881, and was issued under the Great Seal of Canada, and was directed to David B. Read, Q. C. It recited that by the Imperial Act 22 Geo. III. ch. 75, among other things, it was

in effect by the said statute enacted that if any person holding an office in any colony of Great Britain should neglect the duty of such office, or otherwise misbehave therein, it should and might be lawful to and for the Governor in Council to remove such person from such office. It also recited that certain members of the legal profession residing and practising in the county of Huron, in the Province of Ontario, had, by their petition to the Governor-in-Council, preferred certain charges against His Honour Wilmot Richard Squier, Judge of the County Court of the county of Huron, alleging neglect of duty and misbehaviour in his capacity as such Judge, which charges were particularly set forth in such petition, a copy of which was annexed; and that the Governor-in-Council deemed it expedient that enquiry should be made into the said charges.

The commission then proceeded, and appointed the said David B. Read, the commissioner in that behalf, to examine into and report upon the matters and things so charged against the said Judge, and particularly set forth in the said petition.

The commission concluded: "And we do hereby confer upon you, the said David Breakenridge Read, full power and authority of summoning before you any party or witness, and of requiring them to give evidence on oath orally or in writing [or on solemn affirmation, if they be parties entitled to affirm in civil matters], and to produce such documents and things as you, as such commissioner, may deem requisite to the full investigation of the matters into which you are appointed to examine; and we do require you the said David Breakenridge Read, forthwith after the conclusion of such enquiry, to make full report to us touching the said investigation, together with a return of all or any evidence taken by you concerning the same."

Under that commission the commissioner, by his notice in writing, dated the 6th of January, 1882, addressed to the said Judge, required him to take notice that he, the commissioner, appointed Monday, the 16th of January,

1882, at the office of J. T. Garrow, barrister, at Goderich, between the hours of 10 A.M. and 4 P.M., to receive any answer in writing the said Judge might wish to make to the charges contained and set forth in the paper to the said notice annexed, which answer was required to be left in an envelope addressed to the said commissioner at Toronto; and the Judge was further required to take notice that by virtue of the said commission the said commissioner had appointed Tuesday, the 24th of January following, at the Grand Jury Room in the Court House at the said town of Goderich, at the hour of 10 o'clock in the forenoon, to proceed with the investigation of the charges contained in the said petition, and to hear such evidence as might be offered in regard to the same, and to hear the answer and such evidence as the Judge might adduce respecting the same, and the Judge was thereby required to attend in person at the time and place last appointed.

The Judge made affidavit on the 14th of the same month, that he was served with the said notice: that he believed the said D. B. Read intended to, and would unless prohibited therefrom by the writ of this Court, proceed at the time and place appointed to hold in a public manner a so-called investigation as stated therein, and call upon sundry persons then and there to give evidence, and permit such persons to make in a public manner, and under the colour of giving such evidence upon the said investigation, various calumnious and scandalous statements in reference to the charges annexed to the said notice; and he added that he entirely denied the right of His Excellency the Governor in Council to cause the issue of the said commission or to authorize the said commissioner or any person to hold the so-called investigation; and he protested against and objected to a gentleman at the bar, however eminent he might be and greatly to be respected, being deputed to hold, in the manner and form proposed, such an investigation as that intended into a matter of such gravity and public importance as that of the conduct of a member of the Judiciary of the Province.

A copy of the commission of the Judge was filed upon the motion, appointing him Senior Judge of the County Court of and for the County of Huron. It was tested the 30th of July, 1877, and was "to have, hold, exercise, and enjoy the said office unto you, the said Wilmot Richard Squier, during good behaviour and during your residence within the said County of Huron."

The learned counsel in support of the motion argued:—

The C. S. U. C. ch. 15, sec. 3, declares the Judges of the County Courts "shall hold their offices during good behaviour, but shall be subject to removal by the Governor for inability or misbehaviour, in case such inability or misbehaviour be established to the satisfaction of the Court of Impeachment for the trial of charges preferred against Judges of County Courts."

The British North America Act, sec. 96, authorizes the Governor-General to appoint the, Judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Sec. 99: "The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

The Court of Impeachment for the trial of charges against Judges of the County Courts for inability or misbehaviour in office was established by the 20 Vic. ch. 58.

By 32 Vic. ch. 22, sec. 1, O., the Legislature assumed to repeal C. S. U. C. ch. 15, sec. 2, which gave the Governor power to appoint County Court and junior County Court Judges.

By sec. 2 of the same Act, sec. 3 of the C. S. U. C. ch. 15, above stated, was also assumed to be repealed, and power was assumed to enact that County Court Judges should hold their offices during pleasure, subject to be removed by the Lieutenant-Governor for inability, incapacity or misbehaviour, established to the satisfaction of the Lieutenant-Governor-in-Council.

By the 33 Vic. ch. 12, O., sec. 2 of the 32 Vic. ch. 22, was repealed, and this last enactment declared the County Court Judges should hold office during good behaviour, but be removable by the Lieutenant-Governor for inability, &c.

By the 32 Vict. ch. 26, O., the Legislature assumed the power to repeal the Consol. Stat. U. C. ch. 14, and thereby to abolish the Court of Impeachment.

The R. S. O. ch. 42, sec. 2, continues the 33 Vict. ch. 12, sec. 1, declaring County Court Judges shall hold their office during good behaviour, but be removable by the Lieutenant-Governor for inability, incapacity, or misbehaviour, established to his satisfaction.

The remedy now pursued, to hold an enquiry into the conduct of the Judge by commission, under the Imperial Act, recited in it, is not maintainable in law.

The learned counsel further argued that the powers of that Act can only be exercised when there is not a constituted government with the wide and liberal powers which are possessed by Canada. If, however, such power can in any case be exercised here, it can only be in the event of there not being any other remedy provided by the legislation of the country. Here there is a Court specially created for the purpose of making such an enquiry. It is true the Ontario Legislature assumed, as just stated, to abolish it; but there was no such power vested in that Legislature, because it was a Court established for the trial not of Ontario officers, but of officers of the then Province of Canada, and who are now, and were at the time when that Court was attempted to be abolished, officers of the Dominion of Canada. It is therefore, notwithstanding the assumed power of the Ontario Legislature to abolish it, a Court still in full force and operation for the trial of such matters as are the subject of investigation under this commission.

Again, the Imperial Act of 1782 applies only to cases in which patents have been issued in England, and not when they are issued in the colony. All the cases are of that description. *A sci. fa.*, it is laid down, may

lie to repeal the patent. But whatever the remedy, the one which is now taken under the Imperial Act is not the proper one. Commissions which are legally issued may be *executed* in the manner in the Consol. Stat. C. ch. 13, and the 31 Vict. ch. 38, D., mentioned; but these Acts do not authorize commissions *to be issued*.

He referred to Com. Dig., Officer K; Bac. Abr., Office M., Can. Law Jour., November, p. 400; Can. Law Jour., December, p. 445. The Crown is not authorized to issue commissions to make enquiries of this nature without the sanction of Parliament. The Oxford University Commission, which will be referred to on the other side, is a case in point.

Robinson, Q C., on behalf of the Dominion Government, shewed cause. In addition to the statutes already mentioned, 8 Vic. ch. 13, sec. 2, may be referred to, by which the County Court Judges held their offices during good behaviour, removable on the address of the Legislative Council and Legislative Assembly. It may be that the Act relating to the Court of Impeachment, C. S. U. C. ch. 14, is still in force, and the Ontario Legislature had not the power to repeal it, either under the B. N. A. Act, sec. 92, or under any other of their powers. But the cases of *Willis v. Gipps*, 5 Moore P. C. 379, and *Montagu v. The Lieutenant Governor of Van Dieman's Land*, 6 Moore P. C. 489, shew that the Imperial Act of 1782 applies to Judges. It is not confined to cases in which the grantees of office have received their patents in England, and there can be no reason why the Act should not be equally operative when the patent of office has been granted in the colony. That Act may still be proceeded under although there may be other remedies as well taken against the Judge: See *Regina v. Amer*, 42 U. C. R. 391; *Ex parte Robertson In re The Governor-General and Council of New South Wales*, 11 Moore P. C. 288; *Osgood v. Nelson*, L. R. 5 H. L. 636; *Musgrove v. Pulido*, L. R. 5 App. 102; *The*

Queen v. Coote, L. R. 4 P. C. 599; and the memorandum of the Lords of the Council on the removal of Colonial Judges, as stated in 6 Moore P. C., pp. ix. to xx., in the appendix; *Chitty* on Prerogative 77. The Governor may, under the Act of 1782, and notwithstanding the Court of Impeachment, proceed under the commission. There is nothing in either statute to prevent it. Under the latter Act, sec. 4, the Governor does not and is not required to forward every case to the Court of Impeachment, but only if he "finds the same sufficiently sustained and of sufficient moment to demand judicial investigation by the Court of Impeachment." That seems to contemplate a preliminary investigation by the Governor. If the Governor had power to issue a commission under any authority which is vested in him, but had not the power to issue it under the Act of 1782, the recital in the commission of that Act may be rejected and the commission be supported under his own powers or under the prerogative authority. The case of the Oxford University commission shews an extraordinary difference of opinion among the most eminent counsel of the day, as to the validity of that commission: Turner, Bethel, Keating, and Kenyon, pronounced the commission to be "not constitutional or legal," and Dodson, Advocate-General, Cockburn, Attorney-General, and Page Wood, Solicitor-General, saw "no reason to doubt the perfect propriety of the commission on legal or constitutional grounds." If no statute authorize the issue of the commission, and if the Crown have power to issue such a commission, the right of the Governor to issue it must depend upon the extent of his commission: *Musgrave v. Pulido*, L. R. 5 App. Cas. 102. He referred also to *High* on Extraordinary Remedies, sec. 782.

McCarthy, in reply. As it is conceded the Court of Impeachment is still a subsisting Court, this commission must fail. The 31 Vic. ch. 38, D., although it may authorize an enquiry to be made into the administration of Justice,

will not authorize an investigation, under so general a phrase, to be made into the conduct of a judicial officer. There is no power to issue such a commission at the common law. The commission in effect creates a Court to try the Judge of the County Court, and such a Court is unconstitutional, and more particularly as he holds a freehold office: 5 Com. Dig. 214; 6 *Petersdorff's* Abr. 286 and note; *High* on Extraordinary Remedies, secs. 776-777; *Re Hughes*, 8 U. C. L. J. 203.

January 27, 1882. WILSON, C. J.—It seems to be admitted by the able counsel who gave an opinion in favour of the validity of the Oxford University Commission, that the Crown has no power to issue a commission by its prerogative, giving authority to the commissioner “to examine into and report upon the matters and things so charged against the said W. R. Squier, and summon before him any party or witness, and to require them to give evidence on oath orally or in writing, or by solemn affirmation, and to produce such documents and things as the commissioner may deem requisite to the full investigation of the matters into which he is appointed to examine.” In that case the commission was “for the purpose of enquiring into the state, discipline, studies and revenues of our University of Oxford, and of all and singular the colleges of our said University;” and “to call” before the commissioners such persons as they may judge necessary, and to call for and examine all such books, &c., and to enquire of and concerning the premises by all other lawful ways and means whatsoever. And the counsel whose opinions were in support of that commission, said, (1) commissions to impose burdens by the sole authority of the Crown; or (2) armed with power of fine and imprisonment; or (3) to hear and determine offences contrary to law; “and (4) commissions to hear and enquire into offences without determining them, unknown to and contrary to the law,” were the kind of commissions referred to in the opinion given against the validity of the commission then under

consideration, and not mere commissions of enquiry such as that one was. And it seems to be admitted that the kinds of commissions above referred to, excepting mere commissions of enquiry, were not valid in law: The blue book referred to in the report of the commissioners on the University printed in 1852, presented to parliament. That commission I find to have been discussed in 46 Law Mag. 79, and in 15 Jur., 2nd part, p. 185. The Crown would not withdraw that commission, although requested so to do by the university. In this case the commission is to make inquisition into the conduct of the County Court Judge, and for that purpose the commission creates a species of court not warranted by the common law, and ranges under the 4th class above enumerated.

With reference to commissions of enquiry, but not to hear and determine, it is said in 12 Co. 31, it "is against law; for by this a man may be unjustly accused by perjury and he shall not have any remedy * * and no such commission was ever seen to enquire only (*i. e.* of crimes.)"

The right to issue this commission must therefore rest upon some statutory authority. If the Queen cannot herself issue a commission of this nature it is very certain she cannot confer power upon the Governor-General to grant such a commission in her name.

By the 22 Geo. III. ch. 75, it is enacted, sec. 1, "That no office to be exercised in any colony or plantation * * shall be granted or grantable by patent for any longer term than during such time as the grantee thereof or person appointed thereto shall discharge the duty thereof in person and behave well therein." Sec. 2, "If any person holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised without a reasonable cause, to be allowed by the Governor and Council, or shall neglect the duty of such office or otherwise misbehave therein, it shall be lawful for the Governor and Council to amove such person from any such office," with right of appeal to the party aggrieved to Her Majesty in Council.

There have been several cases of amotion under that Act. *Willis v. Gipps*, 5 Moore's P. C. 379, is one of them.

In that case the Judge was appointed by Her Majesty, under the Imperial Act, 9 Geo. IV. ch. 83, one of the Judges of the Supreme Court of New South Wales by warrant under the Privy Seal and sign manual, whereupon he went to New South Wales and received his patent under the seal of the colony.

By statute 4 Vic. No. 22, of the Local Legislature, the Governor was empowered to appoint one of the Judges of the Supreme Court to reside in the District of Port Philip, and Willis, the appellant, was appointed such resident Judge for that district by patent under the seal of the colony, on the 8th of February, 1841.

Afterwards the Governor brought before the Executive Council of the colony certain complaints against the appellant for alleged misbehaviour in his office of resident Judge at Port Philip, and the matter of complaint was proceeded on in Council on the 21st of December, 1842, and on the 16th, 17th, and 20th of January, 1843. No notice was given to the appellant of the accusations preferred against him, nor of the proceedings of the Governor and Council thereon, and on the 24th of June, 1843, the appellant was amoved from his office of resident Judge at Port Philip, and from his office as one of the Judges of the Supreme Court. The decision was, the Governor and Council had power to amove the Judge, and there were sufficient grounds for his amotion; but as he had not been heard against his amotion, the order of the Governor and Council amoving him was reversed. In that case the Governor and Council made the enquiry into the charges.

In *Montagu v. The Lieutenant-Governor of Van Dieman's Land*, 6 Moore's P. C. 489, the appellant was appointed a Judge of the Supreme Court of New South Wales by patent under the Great Seal of Great Britain, to hold during pleasure.

On 23rd November, 1847, Mr. Young presented a petition in the name of Mr. McMicken to the Governor,

containing charges against the appellant in his office of Judge. The day after a copy of the petition was sent by the Secretary for the colony to the appellant, with a request he would offer such explanations as he might think necessary.

On the same day the appellant sent his answer.

On the 3rd of December Mr. Young sent in his reply on behalf of his client, and on that day Mr. Young sent in another communication to the Governor, stating certain other charges as solicitor to the Hobart Town Branch of the Bank of Australasia against the appellant.

On the 10th of December the Secretary for the colony wrote to the appellant that the Executive Council were of opinion the petition of Mr. McMicken, of the 3rd of November, and the statement of the solicitor, of the 3rd of December, seriously affected his character and standing as a Judge of the Supreme Court; and he called upon him to shew cause why he should not be suspended from office until her Majesty's pleasure was known, and he particularly called the appellant's attention to several of the matters charged against him.

The appellant denied the power of the Lieutenant-Governor to suspend a Judge from office, stating the functions of the Court could not be carried on by the remaining Judge, and that he would continue to act as a Judge, and he requested the communication just made to him to be modified.

The Lieutenant-Governor refused to do so, and the appellant was informed his case would be brought forward for final decision upon Friday, unless he showed cause why further delay should be granted him.

The appellant applied for and obtained further time till the 28th of December, when he transmitted a rejoinder explaining and justifying his conduct.

The Lieutenant-Governor and the Executive Council, having before them the accusation and defence, came to the conclusion that the charges were proved, and that suspension was an inadequate sentence, and that the case

came within the Act of 1782, and justified the appellant's amotion from his office of Judge; and sentence of amotion was passed on the 31st of December, 1847.

The decision was that the Governor and Council had the right of amotion under the 22 Geo. III. ch. 75: that notwithstanding the irregularity in proceeding for a suspension, and then directing an amotion, yet as no injustice had followed from such irregularity, a reversal of the order of amotion was not recommended.

In that case, also, the proceedings were carried on before the Governor and Council.

In *The Representatives of the Island of Granada v. Sanderson*, 6 Moore's P. C. 38, the memorial was direct from the complainants to her Majesty, and referred to the Privy Council.

In *Ex parte Robertson, In re Governor-General and Council of New South Wales*, 11 Moore's P. C. 288, the Judicial Committee of the Privy Council decided the 22 Geo. III. ch. 75, did not apply to an office, though held under the great seal of the Colony, during pleasure only, but to patent offices held for life, or for a time certain. When an office is held during pleasure the Judicial Committee will not enquire into an amotion, unless by the express command of her Majesty.

In *re Grant*, 7 Moore P. C. 141, the appellant was Master, Accountant-General and Examiner in Equity in the Supreme Court of Judicature at Fort William, Bengal; he was suspended by the Court. It need not further be referred to.

In *Cloete v. The Queen*, 8 Moore's P. C. 484, the proceedings against the Recorder of the District of Natal were also taken by correspondence before the Governor and Council, whereby the appellant was suspended, but that order was reversed by the judicial committee of the Privy Council.

The memorandum of the Lords of the Council on the removal of Colonial Judges, contained in 6 Moore P. C. N. S. Appendix 9 to 20, is a very important document. It states,

"That although," as in the case of Mr. Justice Boothby, "the Legislature of South Australia had passed addresses to the Crown for his removal, that measure did not suffice as it would have done in England, and that although the Legislature might act as his accuser, it rested with the advisers of the Crown in England to dispose of the charges against him.

"All the forms of suspension or removal which are in use," the memorandum states, "lead by different roads to the same result, viz: a hearing before the Privy Council. When a positive motion has been made under Burke's Act, 22 Geo. III. ch. 75, the appeal to the Queen in Council is *strictissimi juris*, being provided for by the statute itself."

They do not *recommend* the Local Legislatures presenting memorials to Her Majesty, because they are in the nature of original proceedings before the judicial committee, but recommend the proceedings shall be by investigation in the colony, and by suspension or motion there, with the right of appeal to the Privy Council. It appears then that the mode of procedure in all these cases under the 22, Geo. III., ch. 75, was by enquiry and by examination before the Governor and Council, and not by commission, and not under oath.

Does the Imperial Act of 1782 authorize the Governor to issue such a commission as the one in question: that is, one to enquire into the conduct of a Judge, and to call for witnesses and books, &c., and to swear the witnesses, although the commissioner is not to try or determine the matters committed to him? I am of opinion it does not. The commission is a delegation of authority.

In *Osgood v. Nelson*, L. R. 5 H. L. 636, it was held that the mayor and council of the city of London, having the power of removal, might refer to a committee of their own body the task of examining into the complaint and receiving evidence upon it and reporting thereon; and that the reference to such committee was not a delegation of authority. The committee was to report to the common council, and that body was then to dispose of the case by a trial if there was ground for a trial.

Besides, the Governor and Council have no power by the Imperial Act to put witnesses under oath, as has been done in this case. In the opinion of the law officers of the Crown on the Oxford Commission, they say as to a commission of inquiry such as that was, which was "a commission issued for the purpose of obtaining information in a matter of public concern without the assumption of any compulsory power, and whose sole authority is derived from the respect with which it may be expected that a royal commission will be treated by Her Majesty's subjects, more especially by public bodies and constituted authorities."

The commission now in question goes far beyond the commission referred to, and that one had no other authority than the respect which should be voluntarily given to it. The commission in question cannot in my opinion be supported under the Imperial Act, nor at common law.

If the commission is not sustainable under that Act, is it authorized by the C. S. C. ch. 13, and 31 Vic. ch. 38, D. ? The later of these two Acts is the same as the earlier one, excepting that the words "or the administration of justice therein," which are in the earlier Act, are not contained in the later Act.

It is under the earlier Act then this commission must be supported, if it is to be supported. That Act provides that. (Sec. 1) "Whenever the Governor-in-Council deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of this province, or the conduct of any part of the public business thereof, or the administration of justice therein, and such enquiry is not regulated by any special law, the Governor may by the commission in the case confer upon the commissioners or persons by whom such enquiry is to be conducted, the power of summoning before them any party or witnesses, and of requiring them to give evidence on oath orally, or in writing (or on solemn affirmation, if they be parties entitled to affirm in civil matters,) and to produce such documents and things as such commissioners deem

requisite to the full investigation of the matters into which they are appointed to examine."

Sub-sec. 2 provides for enforcing the attendance of witnesses and compelling them to give evidence, and for the punishment of false testimony as perjury; "but no such party or witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution."

It is under this Act the commission has in part been framed.

It was argued that the Act gave no power to issue commissions, but only provided how they were to be executed when they could lawfully be issued.

I am of opinion it does confer the power to issue commissions for the purposes in the Act mentioned.

Then it was said a commission, if it can be lawfully issued under the Act, can only be for the purpose of causing, so far as this case is concerned, "inquiry to be made into and concerning any matter connected * * with the administration of justice" in the province—that is, into *the subject* of the administration of justice; but that enquiry cannot be had or made into the conduct of any person or official connected with the administration of justice: that it may be made for the purpose of enquiring into the defects in the law, so that the administration of justice may be amended, but it cannot be made for the purpose of getting evidence against any one for his punishment, suspension, or removal from office.

The words of the Act are not so precise as they might have been to cover such a case as the present, but I am of opinion the fair construction of the Act will cover an enquiry into the conduct of any one connected with the administration of justice.

The first section provides that any *party* or witnesses may be summoned to give evidence; and sub-sec. 2 provides that no such *party* or witnesses shall be compelled to answer any question which may render him liable to a criminal prosecution.

The Act contemplates that there may be *parties* besides witnesses, strictly speaking, who may be affected by or concerned in such enquiry; just as Mr. Squier, the County Court Judge, is a party, and as the petitioners against him are parties.

But the objection, in my opinion, to the applicability of this Act in support of the commission is, that the Act only applies when "such inquiry is not regulated by any special law;" and there was from the year 1858, and still is, although the Ontario Legislature assumed, as before stated, to repeal it, a special law which expressly regulates the inquiry in question into the conduct of the County Court Judge. I refer to the Consol. Stat. U. C. ch. 14, the Court of Impeachment Act, under which the necessary inquiry can be made.

So that I am of opinion the commission cannot be supported under the Consol. Stat. C. ch. 13. Nor can it, I think, be supported under the Court of Impeachment Act, Consol. Stat. U. C. ch. 14, sec. 4, although the Governor may call for further information and particulars before he considers the case to be sufficiently sustained and of sufficient moment to demand judicial investigation by the Court of Impeachment; but he cannot issue a commission to get that further information, and certainly it cannot be got under the oath of the witnesses or of the complainant. I may refer also to 1 Wm. & M. Sess. 2 c. 2.

The County Court Judges under the Act 2 Geo. IV. ch. 2, sec. 2, were appointed under the Great Seal of the Province. It is not said what their tenure of office then was. I think it was during pleasure.

The 4 & 5 Vic. ch. 8, does not specify the tenure of office of County Court Judges. I think they still continued during pleasure. The 8 Vic. ch. 13, sec. 2, made their tenure during good behaviour, removable on a joint address of the Legislative Council and the Legislative Assembly.

The 20 Vic. ch. 58, which, among other things, established the Court of Impeachment, did away with the procedure of removing County Court Judges upon the joint address of the two houses of the Legislature, and gave, by

section 10, Judges of the County Courts a tenure of office during good behaviour, but removable by the Governor for inability or misbehaviour, when inability or misbehaviour was established to the satisfaction of the Court of Impeachment then created; and such continued to be their tenure of office, (see C. S. U. C. ch. 15, sec. 3), until the 32 Vic. ch. 22, sec. 2, O., which made their tenure during pleasure, removable by the Lieutenant-Governor for inability, incapacity, or misbehaviour established to his satisfaction. The tenure was again altered by the 33 Vic. ch. 12. sec. 1, O., which made it during good behaviour, removable, as before stated, by the Lieutenant-Governor for any of the causes mentioned, established to his satisfaction; and so it remains by the Rev. Stat. O., ch. 42, sec. 2.

All mention of the Court of Impeachment has been dropped in these two last-named statutes, because the 32 Vict. ch. 26, O., repealed or, I should say, assumed to repeal the Court of Impeachment Act.

These three last-named Acts are not maintainable, so far as they abolish the Court of Impeachment, which was admitted by Mr. Robinson in his argument, and assume to confer power on the Lieutenant-Governor to remove such Judges for any cause.

Their tenure of office may therefore be described as that of Judges during good behaviour, removable by the Governor for inability or misbehaviour, in case it is established to the satisfaction of the Court of Impeachment, just as it is described in the Consol. Stat. U. C. ch. 15, sec. 3. And our own statutes should, I conceive, be amended in these respects.

As County Court Judges are no longer removable by the Governor upon a joint address of the two Houses of the Legislature, when the Court of Impeachment was specially established to meet their case, it is a strong reason why their conduct should not be enquired into by commission under the Consol. Stat. C. ch. 13. If the joint address was done away with for the cause stated, the proceeding by commission to make enquiry is equally done away

with by the Court of Impeachment Act, which certainly gives an enquiry regulated by a special law.

The modes of procedure which I conceive may be taken for the amotion of County Court Judges in this Province are :

1. By proceedings taken under the 22 Geo. III. ch. 75, by and before the Governor and Council.

2. By proceedings carried on by and before the Court of Impeachment, upon the Governor transmitting the complaint made to him and all papers connected with it to the Chief Justice of Ontario, as president of the Court, under the C. S. U. C. ch. 14, sec. 4.

3. By *scire facias*, when the conditions and terms of the patent have been broken: Com. Dig. Officer, K. 11: Bac. Abr. *Offices and Officers*, M.

4. Of course the Legislatures either of Ontario or of the Dominion can address her Majesty to remove a Judge, but such proceeding is the institution of an original cause before the Judicial Committee—Imperial Act 3 & 4 Wm. 4 ch. 41, sec. 4; but that course the Judicial Committee do not recommend to be adopted.

It is quite clear from the authorities quoted by Mr. Todd in his very able work on Parliamentary Government in England, vol. ii. p. 729, *et seq.*, that notwithstanding the introduction of responsible government into many of the colonies, and the facilities afforded in the colonies for the removal of Judges, the remedy given by the Imperial Act 22 Geo. III. ch. 75, can still be adopted; and it may be adopted, as the cases shew, as well when the Judge is appointed by a Colonial as by an Imperial Patent.

As to the remedy by prohibition, see Com. Dig: Prohibition, A 1, A 2; Bac. Abr. Prohibition, vol. 6, p. 564, and Prohibition I, K; *Chabot v. Morpeth*, 15 Q. B. 446; *In re Birch*, 15 C. B. 743; *Ex parte Smith*, 3 A. & E. 719. See also opinion of Counsel for University, p. 26 of the Blue Book.

I am of opinion it may issue in this case to restrain the execution of this commission, as the commission is, for the

reasons I have stated, not maintainable in law ; but I shall reserve that part of the case, as it may be unnecessary absolutely to determine it, and will afford the parties an opportunity of knowing that my opinion is against the validity of the commission, to determine what course they may, and more especially the Crown authorities will take, or wish to take, concerning it.

Judgment accordingly.

MORRISON V. TAYLOR.

Judgment before appearance—Jurisdiction of Judge—Rule 324.

A Judge sitting in Chambers has no jurisdiction to order judgment to be signed under Rule 324 (a), but a motion for judgment thereunder must be made to the Court.

On the 20th day of January, 1882, *Caswell*, for the plaintiff, obtained from Wilson, C.J., in Chambers, an order, on notice to the defendants, to sign judgment under rule 324, O. J. A. Subsequently the defendants assigned their estate and effects to an assignee for the benefit of all creditors.

On 3rd February, 1882, *J. H. Macdonald* applied on behalf of the assignee, but in the name of the defendants, to the learned Chief Justice in Court, to set aside the order made by him in Chambers, on the ground that Rule 324 required the motion to be made in Court, although leave to serve notice, &c., might be given in Chambers. He relied upon the difference in the language between subsec. (a) of Rule 324 and the preceding part of it.

February 3, 1882, *Caswell* showed cause, and argued that the word "Court" used in the rule did not necessarily imply that the authority therein conferred on the Court

must be exercised in Court as distinguished from Chambers; that the word "Court" similarly used in many of the Chancery Orders, and in the C. L. P. Act, did not imply "in Court" in the technical sense, but that it only meant the Court by its ordinary and proper modes of procedure, and that as great authority as was to be exercised, under Rule 324, by a Judge in Court, could by other sections of the Act and Rules be exercised by a Judge in Chambers. He referred to *Jackson v. Randall*, 24 C. P. 87; *Smeeton v. Collier*, 1 Ex. 457; *Kilkenny & G. S. & W. R. W. Co. v. Fielden*, 6 Ex. 83.

WILSON, C. J.—By Rule 324, *the Court or a Judge* is to permit a notice of motion to be made for a judgment if of opinion it will be conducive to the ends of justice that such an application should be made; and if permission is granted, the *Court or Judge* is to give directions as to the service of the notice of motion and filing of the affidavits, as may be expedient.

Sub-section (a) then provides that upon the hearing of the motion the *Court* may grant or refuse the application, or, instead, may give such directions, &c., as the circumstances of the case may require, and upon such terms as to costs as the *Court* thinks right.

I think the rule requires I should determine that it is the *Court* only, and not a Judge, which can grant or refuse the application for judgment, &c.

It is true, as Mr. Caswell very satisfactorily showed by his carefully prepared analysis of the Orders in Chancery, the rules under the Judicature Act and several statutes, that when the term *Court* is used it does not exclude a Judge of this Court from acting, and that in such cases the Court is in effect acting by the Judge as one of the recognized modes by which it does act.

But in this case what the *Court or Judge* is to do, and what the *Court* only under the rule is to do, are brought so sharply into apposition that I think I cannot say the special and higher duties which the rule casts upon the

Court, than are imposed by it upon the Court or Judge, may and are nevertheless to be performed by a Judge.

I must set aside the order for judgment, but without costs, and as the plaintiff's act has been so beneficial to the general body of creditors, I hope they may pay the plaintiff's costs of those proceedings of his which have been the means of preserving the defendant's goods for his general creditors.

If the parties can agree to let the plaintiff's judgment stand, but taking priority and effect only from some particular day, it will be better to do so than to set it aside, or the execution only may be set aside.

RULES OF COURT.

THE HIGH COURT OF JUSTICE OF ONTARIO.

MONDAY, 22nd August, 1881.

I. It is ordered by the Judges of the High Court that one of the Judges of the Queen's Bench Division, or of the Common Pleas Division, shall sit in open Court in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both days inclusive, for the purpose of disposing of all Court business in the said Divisions which may be transacted by a single Judge.

II. Such sittings shall be held on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

III. One of the Judges of the Chancery Division of the said High Court shall sit in open Court in Osgoode Hall every week, except during the long vacation and except during the period from the twenty-fourth day of December to the sixth day of January, both inclusive, for the purpose of disposing of all business of the said Division which may be transacted by a single Judge.

IV. The business before the said Judge shall be taken as nearly as may be as provided by the General Orders of the Court of Chancery.

V. Demurrers and special cases shall be set down to be heard, and notice thereof given to the opposite party six days before the day on which they are to be heard.

VI. A copy of the demurrer book or of the special case shall be left with the Registrar of the Division in which the action is pending, for the use of the Judge before whom such demurrer or special case is to be heard, two days before the day appointed for the hearing thereof.

VII. All rules or orders *nisi* directed to be issued by the Judge shall be four-day rules, and shall be set down to be heard

at the first sittings of the Judge in open Court, for arguments after the same are returnable, unless otherwise ordered by the said Judge.

VIII. The proceedings before a Judge sitting as aforesaid shall shew on their face in any judgment, decree, rule, or order to be given or made that the business was carried on before a single Judge, as follows:—"In the High Court of Justice for Ontario. Before the Hon. Mr. Justice———" [*naming the Judge*].

IX. It is ordered that the Divisional Courts of the High Court do meet on Tuesday, the twenty-third day of August, instant, at eleven o'clock, a.m.

THURSDAY, 25th August, 1881.

X. All mortgages, stocks, funds, annuities, and securities, and all interest and estate therein; and all moneys and effects standing in the name of the Accountant of the Court of Chancery or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or of the Clerk of the Crown and Pleas of the Common Pleas, on the 21st day of August, 1881, be and the same are hereby transferred to and vested in the Accountant of the Supreme Court as such Accountant, subject to the same trusts as respectively attach thereto, and the same officers are to execute all necessary cheques or documents to effect a formal transfer thereof.

SUPREME COURT OF ONTARIO.

THURSDAY, 25th August, 1881.

GENERAL RULES

Made under the authority of sec. 51 of the Ontario Judicature Act.

495. These Rules may be cited as the Rules of the Supreme Court of Ontario, 1881, or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Rule mentioned in the margin.

496. In Rule 45, sub-sec. (d), the word "act" is hereby substituted for the word "action" in the first line thereof.
497. In Rule 74, sub-sec. (a), the word "satisfied" is hereby substituted for the word "notified" in the third line thereof.
498. In Rule 246, sub-sec. (a), the word "produce" is hereby substituted for the word "prove" in the third line thereof.
499. In Rule 352, sub-sec. (b), the word "periods" is hereby substituted for the word "period," in the fourth line of the said sub-section.
500. In Rule 376 the word "proceeding" is hereby substituted for the word "proceedings" in the fourth line thereof.
501. Rule 100 is hereby amended by inserting after the word "summons," in the fourth line thereof, the words "or on notice, as the case requires."
502. Rule 78 is amended by adding after the word "behalf," in the last line, the words "in which the reference, when required by the practice, shall be to the Master or Local Master."

MONDAY, 5th September, 1881.

503. Where a seal is, under the fifty-first section of the Judicature Act, impressed on any document which before the passing of the said Act, did not require to be sealed, the fee of fifty cents mentioned in the fifty-third section of the Superior Courts of Law Act (R. S. O., cap. 39) shall not be payable on such document.

TUESDAY, 3rd January, 1882.

504. Copies of orders dispensing with payment of money into Court are, in all cases to be left with the Accountant forthwith, after entry thereof.
505. Where infants are concerned, no order dispensing with payment of money into Court is to be made without notice to the guardian *ad litem* of the infants.
506. No conveyance of the lands of infants is to be settled until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment

thereof into Court having been dispensed with ; and in cases where there is to be a mortgage for part of the purchase money, until evidence is given to the said officer of such mortgage having been registered and deposited with the Accountant.

507. It shall be the duty of the official guardian to see that moneys payable on mortgages held by the Accountant in which persons for whom the said guardian has acted are interested, are promptly paid, and that the mortgaged premises are kept properly insured, and that the taxes thereon are duly paid.

SATURDAY, 28th January, 1882.

508. It shall not be necessary for the Deputy Clerk of the Crown or Deputy Registrar to transmit to the principal Clerk or Registrar of the several divisions of the High Court at Toronto, the original roll and the papers of or belonging to the same pursuant to section 303 of the Common Law Procedure Act, and rule 419 of the Judicature Act, but instead thereof, every Deputy Clerk of the Crown and Deputy Registrar shall once in every three months transmit to such principal Clerk or Registrar at Toronto a list, in the form hereinafter mentioned, of all judgments which have been entered by him during such period ; and from the said lists the principal Clerks or Registrars shall prepare and from time to time keep up a general index or list of judgments, which shall be open to inspection by all persons interested upon payment of the usual fee.

FORM.

List of judgments entered in the office of the Deputy Clerk of the Crown (or Deputy Registrar as the case may be) of the county of _____ during the three months ending the _____ day of _____ 18 .

- (1) Plaintiff _____ Defendant.
- (2) Date of entry of judgment.
- (3) The amount recovered or other relief given exclusive of costs.
- (4) The amount of costs taxed.

509. All orders issued by a local officer which require to be entered shall be entered at the office of such local officer only (See R. 418.)
510. In view of the state of business in the several Courts, and of doubts that have arisen upon the construction of rules 316 and 317, it is ordered that where, at or after the trial of an action by a jury, the Judge has directed that any judgment be

entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Where at or after the trial of an action before a Judge the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment, upon the ground that the judgment so directed is wrong, and such application may in either of the above cases be to a Divisional Court of the High Court, or to the Court of Appeal, and this rule is to be substituted for rules 316 and 317.

511. In every case in which judgment is entered without trial or or the decision of a Court or Judge or order as to the costs, and where the amount of judgment *prima facie*, appears to be within the jurisdiction of an Inferior Court, the taxing officer shall not tax full costs of the High Court, without proof on affidavit to his satisfaction that the suit was properly instituted therein ; and if properly within the jurisdiction of the County or Division Courts, then the taxation shall be on the scale of fees in such Courts, subject to revision as in other cases.
 512. In case of trial by jury, and the Judge or Court makes no order respecting the costs, under rule 428, the taxation of costs shall be under such scale of allowance only as would have been applicable before the passing of the Judicature Act ; and the event shall in such case be to recover costs according to such scale, subject to such rights of set off as to costs as apply under the Common Law Procedure Act.
 513. Discovery may be obtained under rule 222 after the defence is delivered, or after the time for delivering the defence has expired.
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TARIFF OF FEES

MADE BY THE JUDGES OF THE SUPREME COURT
OF JUDICATURE FOR ONTARIO,

THE 10th DAY OF SEPTEMBER, A.D. 1881

From and after the twenty-second day of August, 1881, the TABLE of Costs following shall be that according to which all Costs in Civil Actions in the High Court of Justice for Ontario shall be allowed and taxed, and no other fees, costs, or charges than therein set down shall be allowed in respect of the matters thereby provided for.

TABLE OF COSTS.

General Allowance for Plaintiffs and Defendants as well as between Solicitor and Client as between Party and Party, approved by the Judges of the Supreme Court of Judicature for Ontario, this tenth day of September, A.D. 1881.

1 Instructions to Sue in Undefended Cases	\$3 00
2 In Defended Cases	4 00
3 Instructions to Defend	4 00

WRITS.

4 All Writs except Subpœnas and concurrent and renewed Writs	2 00
5 Concurrent Writ	1 50
6 Renewed Writ	1 50
If over four folios, for every folio	0 20
7 Subpœna Ad Testificandum	1 00
8 Subpœna Duces Tecum	1 25
If over four folios, additional per folio	0 15
9 Notice of Writ for Service in lieu of Writ out of Jurisdiction and copy	1 00

- 10 (Alias and subsequent Writs to be allowed as originals)
 11 Special Indorsement of Writ of Summons..... \$1 00
 12 NOTE.—Above allowances to include all charges for attending for and delivering to the Officer, and for all notices required to be indorsed on Writ, except as above provided for.

COPY AND SERVICE OF WRITS OF SUMMONS, AND OTHER PROCESS.

- 13 For copy, including copy of notices required to be indorsed, each 1 00
 If over four folios, for every additional folio 0 10
 14 Service of each copy of Writ, if not done by the Sheriff or an Officer employed by him, when taxable to Solicitor on Sheriff's default 1 00
 15 If served at a distance of over two miles from the nearest place of business or office of the Solicitor serving same, for each mile beyond such two miles 0 13
 16 (For Service of Writ out of Jurisdiction, such allowance to be made as the Taxing Officer shall think fit.)

INSTRUCTIONS AFTER COMMENCEMENT OF ACTION.

- 17 To Counsel in special matters 1 00
 18 To Counsel in common matters..... 0 50
 19 For special affidavits when allowed by the Taxing Officer 1 00
 20 For Pleadings in action..... 1 50
 21 For Counter-Claim, when such Claim could not heretofore form the subject of a set-off 2 00
 22 For Reply to such Counter-Claims 2 00
 23 To amend any pleading when the amendment is occasioned by a pleading other than a demurrer of the opposite party 2 00
 24 For Confession of Defence under Rule 157..... 2 00
 25 For Special Case in course of action 2 00
 26 For Special Case when no Writ issued, or Pleadings had, and no instructions to sue allowed 3 00
 27 To add parties by order of Court or Judge 2 00
 28 For Brief 2 00
 29 For every Suggestion..... 1 00
 30 For adding Parties in consequence of marriage, death, assignment, &c. 1 00
 31 For Issue of Fact, by Consent, or Judge's Order.... 2 00
 32 To defend added Parties after suggestion of death of original party, or on revivor..... 2 00

33 For Confession of action in ejectment as to the whole, or in part	\$1 00
34 To Strike or Reduce Special Jury	2 00
35 For such other important step or proceeding in the suit as the Taxing Officer is satisfied warrants such a charge	2 00

DRAWING PLEADINGS, &c.

36 Statement of Claim	2 00
37 If above ten folios, for every folio above ten, in addition	0 20
38 Statement of Defence, if five folios or under	2 00
39 If above five folios, for every folio in addition	0 20
40 Statement of Defence and Counter-Claim, up to fifteen folios	3 00
41 For every folio over fifteen	0 20
42 Reply and other Pleadings for or on behalf of Plaintiff or Defendant	2 00
43 If above ten folios, for every folio in addition	0 20
44 Demurrer	2 00
45 Petition, per folio	0 20
46 Issue for Trial of Facts by Agreement or Order, for every folio	0 20
47 Special Case, per folio	0 20
48 Drawing Interrogatories or Answers for any purpose required by law, including engrossing, per folio	0 20
49 (The above charges include engrossing, but not copies to file or serve.)	
50 Taking Cognovit and entering Judgment thereon when there has been no previous proceeding and the true debt does not exceed \$200	8 00
51 For same services when the true debt exceeds \$200 ..	12 00
52 Drawing and engrossing Cognovit and attending Execution when there have been previous proceedings	2 00

COPIES.

53 Of Pleadings, Brief, and other Documents, when no other provision is made, and copies properly allowable	0 10
54 Certified Copy of Pleadings or issue, for use of Judge	1 50
55 For every folio above fifteen, per folio	0 10
56 Of Special and Common Orders of Court	0 75
57 Of Special Order of Court above three folios, per folio	0 20
58 Of Summons, or Order, of a Judge	0 50

NOTICES, INCLUDING COPY.

59 Of Appearance, when duly entered and Notice given on the day of Appearance, but not otherwise ..	\$0 50
60 To Sheriff, to discharge Prisoner out of Custody....	0 50
61 Notice, in Action for Recovery of Land, to Defend for part of Premises: not to be allowed when Defence limited by Appearance	1 00
62 If above three folios, per folio in addition	0 20
63 Notice of Claimant's or Defendant's title in Action for Recovery of Land, same fees.	
64 Notice of Entry of Appearance in Action for Recovery of Land by a party not named in Writ	0 50
65 Notice of Admission of Right and Denial of Ouster by a joint tenant	0 50
66 If above three folios, for every folio additional	0 20
67 Of Discontinuance and one copy	0 50
68 For every additional copy, per folio	0 10
69 Of disputing amount of claim	0 50
70 Of Confession of Action in Action for Recovery of Land, as to whole or part	0 50
71 Notice in lieu of Statement of Claim, and one copy	0 50
72 For every additional copy, per folio	0 10
73 Of Trial or Assessment and one copy	0 50
74 For every additional copy, per folio	0 10
75 Demand of Residence of Plaintiff.....	0 50
76 Demand of names of partners	0 50
77 All Common Notices not above specified.....	0 50
78 Notice to Admit and Produce, if not exceeding two folios and one copy.....	0 50
79 For every additional copy, per folio	0 10
80 For each necessary folio above two	0 20
81 Notice of setting down on Motion for Judgment, or on further direction and one copy	0 50
82 For every additional copy, per folio.....	0 10
83 Notice of Motion in Court or Chambers, engrossing and copy to serve, per folio	0 20
84 For every additional copy, per folio.....	0 10
85 Notice of Taxation or Appointment to tax, and one copy	0 50
86 For every additional copy, per folio	0 10
87 For preparing and filling up for Service in any Cause or Matter, each Notice to Creditors to prove Claims, and each Notice that Cheques may be received, specifying the amounts to be received for principal and interest, and costs, if any—including mailing	0 25

88 Notice of filing Affidavits, when required, and one copy (only one notice to be allowed for a set of affidavits filed, or which ought to be filed, together)	\$0 50
89 For every additional copy, per folio	0 10
90 Notice by Defendant to third party, under Rule 108	1 00

PERUSALS.

91 Of Statement of Claim or Statement of Defence, including counter claim, if any, if statement or defence special and raise difficult questions for consideration	1 00
92 Of special case by the Solicitor of any party, except the one by whom it is prepared, when case is submitted in the course of the cause	2 00
93 Of interrogatories and cross interrogatories on commission	1 00
94 Of affidavits and exhibits of a party adverse in interest, filed or produced on any application, where they exceed 20 folios, so far as their perusal is necessary, per folio, over 20 folios ..	0 50
95 Not in any case to exceed the sum of \$5.	

ATTENDANCES.

96 Necessary attendances consequent on the service of a notice to produce or admit, including making admission, altogether	1 00
97 (To be increased by Taxing Officer in case of a special, difficult and important nature to \$2.)	
98 For summons in Chambers, including drawing and obtaining same	1 00
99 Attending on return of summons or notice of motion in Chambers to be increased in the discretion of the presiding officer to \$2	1 00
100 (Such increase to be marked at the time the order is made.)	
101 On consultation or conference with counsel in special, difficult and important matters in the discretion of the Taxing Officer in Toronto	2 00
102 (And to be increased in his discretion as between solicitor and client, to such sum as he shall see fit.)	
103 Solicitor attending Court on trial of cause when not himself counsel or partner of counsel	2 00

104	And in special, difficult and important cases, each hour necessarily present at trial (in no case to exceed \$10 per day	\$2 00
	(Provided the attendance of such solicitor and the length of time of such attendance be duly entered at the time in the book of the Registrar, Deputy Registrar, Deputy Clerk of the Crown, Clerk of Assize, or other officer of the Court present at the time.)	
105	To hear judgment when not given on close of argument	2 00
106	To hear judgment when cause on list for judgment, but judgment not given	2 00
107	On taxation of costs, per hour	1 00
108	On revision, per hour, when attendance required by taxing officer, or revision had on notice or order	1 00
109	To obtain or give undertaking to appear, when service accepted by a solicitor	1 00
110	Attendance to file or serve	0 50
111	Attendance on warrant or appointment of Master, Registrar, Special Examiner or Referee, per hour	1 00
112	To be increased in the discretion of the taxing officer in Toronto to not exceed per hour	2 00
113	Attendance on Master or Registrar in special matters, per hour	1 00
114	Every other necessary attendance	0 50
115	Provided that on special and important points, and matters requiring the attendance of Counsel, before the Master, Special Examiner, or Referee, Judgment Clerk, or Inspector of Titles, the Taxing Officer in Toronto may, in lieu of the fees for attendance, allow a Counsel fee when Counsel attend the same, and such attendance is noted at the time.	

BRIEFS.

116	For drawing Brief, not exceeding five folios	2 00
117	For drawing Brief, per folio, for original and necessary matter	0 20
118	Copy of Documents other than Pleadings, per folio ..	0 10
119	Copy of Brief for Second Counsel when fee taxed to him, per folio	0 10

COURT FEES (TERM FEES.)

120	Fees after Statement or when Statement dispensed with after filing Writ, on Defence, Joinder of Issue, Trial, on Argument before Courts and on Judgments other than Præcipe Judgment in Mortgage Cases. No two fees to be allowed	
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either party when such proceedings are taken or had between the first day of any Sittings of the Courts fixed by Rule 480 and the first day of following Sittings so fixed

		\$1 00
121	Fee on certified Copy of Pleadings for Judge	1 00
122	On every Order, of Court and Judge's Order, or Order of Master in Chambers	1 00
123	Fee on Præcipe Judgment in Mortgage Cases	4 00

AFFIDAVITS.

124	Drawing Affidavits, per folio	0 20
125	Engrossing same to have sworn, per folio	0 10
126	Copies of Affidavits, per folio, when necessary	0 10
127	Common Affidavits of Service, including service by post when necessary, or of payment of mileage and of non-appearance, including copy, oath, and attending to swear	1 00
128	The Solicitor for preparing each exhibit in town or country	0 10
129	Commissioner for each oath	0 20
130	Commissioner for marking each exhibit	0 10

DEFENDANTS.

131	Appearance, including attending to enter	1 00
132	For limiting Defence in Action for Recovery of Land in Appearance, besides above allowance for Appearance; not to be allowed when notice of Limiting Defence served	1 00

JUDGMENT, RULES, OR ORDERS.

133	Drawing Special Minutes of Judgment or Order, per folio, when prepared by Solicitor, under directions of Registrar, or Judgment Clerk	0 20
134	Judgment for Non-appearance on Specially Indorsed Writs, and in Action for Recovery of Land	1 00
135	Attending for appointment to settle or pass Judgment or Order of Court, copy and service	0 80
136	When served on more than one party, the extra copies and services are to be allowed.	
137	For every hour's attendance before proper officer on Settling Minutes, or passing	1 00
138	(To be increased in the discretion of the Officer in special and difficult cases, when the Solicitor attends personally, to a sum not exceeding altogether)	5 00

LETTERS.

139	Letter to each Defendant before suit, only one letter to be allowed to any defendants who are in partnership, and when subject of suit relates to the transactions of their partnership	\$0 50
140	Common Letters, including necessary Agency letters	0 50
141	With power to the Taxing Officer as between Solicitor and Client to increase the fee for special and important letters to an amount not exceeding ..	2 00
142	Postages—the amount actually disbursed.	

SALES, BY MASTER OR AUCTIONEER.

143	Drawing advertisements for the sale of Real or Personal Estate, under the direction of the Court, including all copies, except for printing	2 00
144	And for each folio over five, per folio	0 20
	(To be increased in the discretion of the Master to a sum not exceeding ten dollars, when special information has been procured for the purpose of sale.)	
145	Copies for printing, per folio	0 10
146	Attending and making arrangements with auctioneer	1 00
147	Revising proof	1 00
148	Fee on conducting sale when held where Solicitor resides	5 00
149	If Solicitor is engaged more than three hours, for every hour beyond that time	1 00
150	Fee on conducting sale elsewhere, besides all necessary travelling and hotel expenses, when Solicitor attends with the approval of the Master previously given	10 00
151	If the sale occupies more than one day, the Master may allow him, in addition to his travelling expenses, <i>per diem</i> , a sum not exceeding twenty dollars.	
152	(The Master may also allow to one other party to the suit his fees and expenses for attending sales, if, in his opinion, it is necessary and proper that he should attend.)	

MISCELLANEOUS.

153	Statement of issues in Master's Office when required by the Master	2 00
154	For each folio over ten	0 20
155	(When it has been satisfactorily proved that proceedings have been taken by Solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the Taxing Officers in Toronto.)	

156	Drawing bill of Costs as between party and party for taxation, including engrossing and copy for Taxing Officer, per folio	\$0 20
157	Copy per folio to serve	0 10

COUNSEL FEES.

158	Fee on Motion of Course, or on Motion for Order <i>Nisi</i> , or on Motion to make Order absolute in matters not special.....	2 00
159	On Special Motion for Order <i>Nisi</i> , and on special application to the Court, only one Counsel fee to be taxed.....	5 00
	(To be increased to \$10 in the discretion of the Taxing Officer in Toronto, who shall mark amount to be taxed on order of Court, if any, before taxation.)	
160	Fee on Argument on supporting or opposing application to the Court, orders <i>Nisi</i> or Argument of Demurrer, Special Case, or Appeal	10 00
161	To be increased in the discretion of the Taxing Officer in Toronto.	
162	Fee with Brief on Assessment	10 00
163	Fee, with Brief, at Trial	10 00
164	To be increased by Taxing Officer in his discretion to a sum not exceeding \$20 to Senior Counsel, and \$10 to Junior Counsel, in actions of a special and important nature, provided that the Taxing Officer in Toronto shall have power to tax increased fees, but more than one Counsel fee shall not be allowed in any case not of a special and important nature, nor more than two in any case.	
165	Fee to Counsel when Counsel attend on Argument or Examination in Chambers, where in the opinion of the Master, or Judge in Chambers, the attendance of Counsel is required	2 00
166	But may be increased in the discretion of the Master or Judge in Chambers to a sum not exceeding \$10.	
167	To attend reference to Master or Referee when Counsel necessary	5 00
168	To be increased in special and important matters requiring the attendance of Counsel in the discretion of the Taxing Officer in Toronto.	
169	Fee on drawing and Settling Allegations in <i>Præcipe</i> for Revivor in Special Cases proper for opinion of Counsel	2 00

- 170 To be increased in discretion of Taxing Officer in Toronto to an amount not exceeding \$5.
- 171 On settling Pleadings, Interrogatories, Special Cases, or Petitions, and advising on evidence in contested cases, in the discretion of the Taxing Officer in Toronto, not exceeding \$5 00
- 172 When any fee is subject to be increased, in the discretion of the taxing officer in Toronto, either party to the taxation may, during its progress, require that such item shall be referred by the local taxing officer to the taxing officer in Toronto, whose decision shall be final as to that item, but this shall not prevent an appeal from or revision of such taxation.
- 173 The taxing officer in Toronto may apply to a Judge or the Court on the taxation of any item which is in his discretion or is referred to him.
- 174 No application shall be allowed by either solicitor or counsel to a Judge or the Court in reference to any item which is in the discretion of the taxing officers in Toronto, but this is not to prevent an application for revision of taxation.

CRIER.

- 175 Calling every case, with or without jury 0 60
- 176 Swearing each witness or constable 0 15

ALLOWANCE TO WITNESS.

- 177 To witnesses residing within three miles of the Court House, per diem 1 00
- 178 To witnesses residing over three miles from the Court House 1 25
- 179 Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence, in consequence of any professional services rendered by them, or to give professional opinions, per diem 4 00
- 180 Engineers, Surveyors, and Architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem 4 00
- 181 If the Witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

- 182 The Travelling Expenses of Witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.
- 183 NOTE.—In taxing Costs between Solicitor and Client, the Master may allow for services rendered not provided for by this Tariff, a reasonable compensation, as far as practicable analogous to its provisions.

J. G. SPRAGGE,

President of the Supreme Court of Judicature for Ontario.

IN THE HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

HILARY SITTINGS, 45 VICTORIA, 1882.

(From February 6 to February 18.)

Present :

HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN DOUGLAS ARMOUR, J.

“ MATTHEW CROOKS CAMERON, J.

NORTH OF SCOTLAND MORTGAGE COMPANY V. UDELL.

*Mortgage—Release of equity of redemption—Merger—Onus of proof—
Action on covenant.*

The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon these points the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant.

Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained.

DECLARATION : Covenant to pay money under a mortgage.

Pleas, in effect, that the plaintiffs took a deed in fee simple in payment and satisfaction.

At the trial at the last Fall Assizes, at Lindsay, before Armour, J., and a jury, it appeared that, on the 23rd of March, 1877, defendant executed a mortgage in fee to the plaintiffs of fifty acres of the north-west quarter of lot 28 in the 7th concession of the township of Verulam, for \$400, at nine per cent. interest, the principal payable on the 1st of March, 1881, with the proviso that, in default of the due payment of interest, the principal should become payable.

On the 26th September, 1877, defendant Udell conveyed in fee to his brother-in-law, one Avery, for \$100, subject to this mortgage, which it was stated that Avery "hereby assumes and undertakes to pay."

In the fall of 1879 one Kennedy, who professed to be acting for the plaintiffs, made a demand on defendant for payment. In the spring of 1880 he again saw him, and told him that the company would take the land if Avery would give them a deed, and that they would clear both of them.

Avery swore that he told him the same. Defendant, at Kennedy's request, gave his promissory note for \$36, being one year's interest on the mortgage; and on March 17th, 1880, Avery and wife executed a deed in fee to the company in consideration of \$1, with ordinary covenants for title, and not referring to the mortgage.

Kennedy and defendant's wife were subscribing witnesses.

This deed was prepared by the company's solicitors in Toronto, and sent by the plaintiffs to Kennedy, returned by him to them, and by them duly registered on the 24th of March, 1880.

Avery swore that he tried to get \$100 from the plaintiffs for executing this deed, but Kennedy said they would pay nothing, and that the deed cleared him and defendant of all claims.

A managing clerk of the plaintiffs in Toronto said that Kennedy had no authority to make any such special arrangement. He (Kennedy) had carried out the loan to defendant.

On the 17th December, 1879, plaintiffs wrote to Kennedy:

"Have you been able to procure deed from Avery to the company? Is there any prospect of a sale being made this year?"

On the 24th February, 1880, plaintiffs wrote to him: "Please send us Mr. & Mrs. Avery's names in full, that we may have deed made out. Is Mr. Fountain going to take this place as per tenor of yours of 14th inst.?"

Prior to this Kennedy had verbally communicated with the Toronto office, and it was understood he was to procure the deed.

On the 20th March, Kennedy wrote to plaintiffs' solicitors: "I have deed Avery *et ux.* to Co. executed. My charge for services are \$4. I had hard work to get Avery to give deed without paying him considerable, as he is going to the U. S. in a few weeks."

On the same day he wrote to plaintiffs to the same effect, and that he had forwarded the deed executed. He said that Avery wanted money, as he knew that they would have to advertise, &c., before they got possession: that he enclosed defendant's note for \$36, which he would surely pay, and would pay the year's taxes, and would perform road work for next year, unless the place was sold; and he had promised to assist in selling.

On 23rd March, plaintiffs wrote to Kennedy: "We have yours of 20th inst., enclosing Udell's note for \$36. Our solicitors have been instructed to remit your fee on deed (\$4) at once."

On the 27th March, Kennedy wrote that one Beck was proposing to buy this land at \$400, and he was trying to get more from him, advising them to take \$400.

On the 2nd April, plaintiffs answered that the land then stood them at \$493.60, and Kennedy's commission on any sale that might be made, and they did not think there should be a loss on it: that if he was sure Udell's note would be paid when due, their claim would be reduced by that amount, adding: "Can't you get Beck to advance in price?"

On the 8th April, Kennedy wrote that he did not expect

Beck would give more than \$425, and that he would not guarantee the payment of Udell's note, though he believed him honest, &c.

There seemed to have been some other correspondence not produced. Plaintiffs had instructed their solicitors to apply to defendant to pay the note. It had not been paid.

This suit was commenced on the 28th March, 1881, the principal being then due.

It was objected that Kennedy had not authority to release defendant from his covenant.

He was not called by either party, although said to be in Court.

The learned Judge very fully explained the facts to the jury, telling them in effect that the plaintiffs were entitled to recover unless they were satisfied that the deed and note were taken by plaintiffs in satisfaction and discharge of defendant's liability on the covenant: that if they thought it was taken in satisfaction, to find for defendants; if not so taken, but under the stipulation or on the understanding that it should not have that effect, to find for plaintiffs: that if it was taken without evidence on either side whether it was taken in satisfaction or not, the inference to be drawn from the instrument would be that it was taken in satisfaction of plaintiffs' claim under the mortgage: that *prima facie* the charge would be merged.

The jury found for defendant.

November 24, 1881. *Bethune*, Q. C., obtained an order *nisi* to set aside the verdict, and to enter a verdict for the plaintiffs, for \$522, or for a new trial, on the ground that the alleged purchase of the equity of redemption by the plaintiffs, and the alleged release by them of the defendant, were contracts respecting a sale of an interest in land, within the Statute of Frauds, and there was no note or memorandum in writing signed by the plaintiffs; and upon the ground of misdirection and want of proper direction of the learned Judge who tried the cause, in the following respects:

1. In telling the jury that the effect of the plaintiffs taking the deed from Avery, nothing being said, was *prima facie* a discharge of the plaintiffs' claim, and that the taking of the deed would operate as a merger.

2. In telling the jury that the inference was, that the intention of the parties was to discharge the covenant in the mortgage.

3. In telling the jury that the company having entrusted Kennedy with the carrying out of the negotiations was bound by whatever he did.

4. In declining to tell the jury that there should be an express authority to carry out a transaction such as that set up by defendant.

Also on the law and evidence, and the weight of evidence, in that no authority to Kennedy was shown to make the alleged arrangement with defendant.

December 6, 1881, *F. D. Moore* shewed cause, citing *Finlayson v. Mills*, 11 Grant 218, and *North of Scotland v. German*, 31 C. P. 349. Whether there was a merger of the mortgage debt was a question of intention, and what the intention of the parties was was a question of fact. The Judge's direction to the jury was right. Where any intention is expressed as to merger effect will be given to the intention, and where there is no evidence of intention it may be gathered from the acts of the parties. Where there is no evidence of an expressed intention either way, a merger takes place. The agreement set forth in the pleas being completed between the parties, and the deed accepted by the plaintiffs in payment of their mortgage debt, there is no necessity for a note or memorandum in writing under the Statute of Frauds to show the mode of payment. The agreement was not made in respect to a *sale of an interest in land*, but in respect of the *payment of a debt* due between the parties, and therefore the Statute of Frauds does not apply.

February 13, 1882. HAGARTY, C. J.—On the argument I was under the impression that we could not uphold the

direction in this case consistently with the judgment of the Court of Common Pleas in these plaintiffs v. *German*, 31 C. P. 349.

A careful examination of the case has convinced me that this is not so, as all the expressions of the Judges must be construed as in reference to the facts there before them. The evidence there clearly shewed that the release of the equity was by agreement not to be a release of the charge.

There is not much direct authority in the books on the burden of proof question.

I gather as the result, however, that the rule of law follows what would surely be the understanding of ninety-nine persons of ordinary intelligence out of one hundred, that if the mortgagee accept a release of the equity of redemption, nothing further being said on either side, the natural presumption must be that the charge is merged in the complete ownership of the inheritance.

It is, of course, open to explanation. I only speak now of its unexplained effect.

In *Heney v. Low*, 9 Gr. 267, Esten, V. C., after noticing the case of the owner of the charge acquiring the estate by devise or inheritance, and then, in the absence of evidence of actual intention, being presumed to have intended what was most for his advantage, adds, at p. 268: "This, however, is very different from a mortgagee purchasing the equity of redemption, where the charge certainly merges unless an intention to the contrary be shewn."

Finlayson v. Mills, 11 Gr. 218, again discusses the matter, and the judgment of Mowat, V. C., may be referred to. He appears to accept generally the view of Esten, V. C.

In *Barker v. Eccles*, 18 Gr. 440, in Appeal, Draper, C. J., notices the general principle, specially referring to *Hood v. Phillips*, 3 Beav. 513; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244.

Hart v. McQuesten, 22 Gr. 143, in Appeal, may also be referred to. In this and some of the other cases the effect of our statute allowing the mortgagee, as judgment creditor, to purchase the estate of mortgagor, is discussed. He takes the equity in discharge of his claim; but his charge, though

gone as against mortgagor, remains for his protection as against other encumbrancers. This legislation was, amongst other objects, to prevent the application of the merger doctrine.

In 2 *Fisher* on Mortgages, 804, the general question is discussed.

From all the authorities I gather that in the simple case of the mortgagee taking a conveyance of the equity of redemption, the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to shew a contrary intent or result.

It is to be observed that the dealing for the release was with defendant and Avery jointly.

Avery, when he purchased defendant's interest, became expressly liable for the discharge of the mortgage money, and could have been compelled to indemnify defendant therefrom.

After striving hard for a valuable consideration, he releases to plaintiffs absolutely for a nominal consideration. What rational inference can be drawn from such a transaction, as it speaks for itself, but that the conveyance was taken in satisfaction and the charge merged?

I am strongly of opinion that the burden is thrown upon the plaintiff to satisfy a jury that a different effect was intended to be given to the transaction.

Apart from the alleged misdirection, the evidence seems to us to shew beyond reasonable doubt that the intention of the parties was to accept the release in full satisfaction and discharge of all claims on the mortgage against defendant or Avery.

The letters in evidence fully establish Kennedy's agency in applying for and getting the release; and the jury were fully justified in accepting the uncontradicted evidence that he so obtained it on representations that its operation would be the complete release of defendant and Avery.

The plaintiffs prepared the deed and sent it for execution, received it back and placed it on record, and then tried to sell the land as their absolute property.

The deed so prepared contains ordinary covenants for title and right to convey free from encumbrances created by the grantor.

All this certainly appears, *primâ facie*, inconsistent with the idea that the grantees retained the right to treat it as a mortgage still subsisting, with a right still to enforce payment, and a corresponding obligation to restore the estate. Defendant had sold for value, and was entitled to indemnity from Avery, his vendee.

The position assumed by the plaintiff in bringing this action renders all this nugatory.

I think the verdict was right, and that there was no misdirection.

It is hardly necessary to discuss the distinctions suggested between the case of the estate coming by devise or inheritance to the owner of the charge, or *vice versâ*, or that of the purchase by act of the owner of the charge of the equity of redemption.

As to the presumptions in the former case, we may refer to such cases as *Forbes v. Moffatt*, 18 Vesey 384; *Hood v. Phillips*, 3 Beav. 513; and *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244. They are often referred to.

ARMOUR, J.—I agree in the result, but desire to guard myself from being understood to agree in the decision by the Court of Common Pleas, in the *North of Scotland v. German*, 31 C. P. 349.

CAMERON, J., concurred.

Rule discharged, with costs.

NOBLE V. THE CORPORATION OF THE CITY OF TORONTO.

Flooding by sewer—Liability of corporation—Proof of negligence—New trial.

The plaintiff leased premises at the corner of Queen and Bathurst streets, which ran at right angles to each other, in Toronto. There was a main sewer on Queen street, with which plaintiff's private drain, constructed by the defendants at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein, at or about Portland street, a wall, said to be for the purpose of dividing the water and causing it to flow eastward and westward. There was a sewer on Bathurst street, south of Queen street. Subsequently, and about four years before the action, a sewer was constructed on Bathurst street, north of Queen street. Into this sewer a creek was turned, in which at times the water was six feet deep; and a number of cross streets drained therinto. Within the four years before action, but never before, the plaintiff's cellar had been flooded several times, and the cause of this action was the flooding during a steady rain of eight or nine hours duration. The plaintiff alleged originally defective construction of the sewers, and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him. A new trial was directed, ARMOUR, J., dissenting.

Per HAGARTY, C. J., and CAMERON, J. The mere proof of the flooding did not establish a *prima facie* case of negligence against the defendants; a specific ground of negligence must be proved, and there was no sufficient evidence of position, connection, capacity, and levels of the sewers on Queen and Bathurst streets.

Per CAMERON, J.—Remarks as to the difference in the liability of, or injuries caused by sewers and by highways.

Per ARMOUR, J.—The fact of the flooding of sewers constructed, controlled and managed by the defendants was *prima facie* evidence of negligence; but the fact that no flooding had occurred before the construction of the Bathurst street sewer north of Queen street, coupled with the other evidence, was sufficient to shew *prima facie* that that sewer brought down more water than the Queen street sewer, and Bathurst street sewers, south of Queen street, were capable of carrying away rapidly enough, and that the plaintiff was entitled to recover.

DECLARATION 1.—That before the grievances complained of the defendants had constructed and maintained and were the owners of certain drains or sewers in the City of Toronto, for the purpose of removing or carrying away the waters on or flowing from the streets of the said city, and the drainage from the houses and premises adjoining said streets, and which said drains or water-courses were at the time of the committing the grievances under the management and control of the defendants, and it was their duty to keep the same in proper repair; yet the defendants so negligently and improperly suffered the said drains or

water-courses to be out of repair for a long time, and to be choked and stopped, so that the courses of the said drains or sewers were changed into a different course or channel, and by reason of the said blocking up of the said original drains or sewers, divers large quantities of water and filth received into the same penetrated and burst through and flowed out of and from said drains or sewers of defendants into the cellars of the premises occupied by the plaintiff adjoining two of the said streets, and carried dirt and filth into the said cellars, and damaged and destroyed the plaintiff's goods, &c.

2. That the defendants, being at the time of the committing of the grievances the owners of and maintaining certain drains or sewers in the city of Toronto, as water-courses for the purpose of carrying the water or filth from and off the streets, lanes, and lands of the said city, and the drainage from the houses adjoining the said streets, were controlling and managing the said drains or sewers, and it was their duty to keep the same in proper order and repair; yet the defendants by their gross negligence allowed and suffered the said drains or sewers to get out of order, and, notwithstanding they were notified of the same, to remain a long time choked and stopped up and incapable of carrying away the waters and drainage from the said streets and houses, by reason whereof the waters and drainage received into the same penetrated and burst through and flowed out of and from the said drains or sewers with great force and violence, bearing with them filth and dirt into the cellar of the premises occupied by the plaintiff adjoining two of the said streets, and remained for a long time at a great depth in said cellar, whereby the plaintiff's goods were damaged, &c.

3. That the defendants, being the owners of certain drains or sewers on and in the neighbourhood of two streets, known as Queen street west and Bathurst street, in the city of Toronto, so negligently, unskilfully, and improperly altered the course and flow of the waters and filth in the said drains or sewers, and it was the duty of the

defendants to keep their said drains or sewers in proper order and repair ; yet the defendants, not regarding their duty in that behalf, at the time of the committing the grievances, kept and continued the same so negligently, insufficiently, and improperly made and constructed, and did at the same time so negligently, improperly, and unskilfully construct and connect other drains or sewers with the said drains or sewers, as to cause and permit such large and unreasonable quantities of water and filth to flow into the same, that by reason thereof the said drains or sewers were too small in size, became choked and blocked up, and divers large quantities of waters and filth received into the same penetrated and burst through and flowed out of and from the said drains or sewers into the cellar of the premises occupied by plaintiff as a grocery and liquor store adjoining the said streets, and remained for a long time in said cellar, whereby the plaintiff's goods and merchandize in said cellar, and the health of the plaintiff, his wife and family, were damaged, &c.

The defendants pleaded not guilty.

The case was tried at the last Summer Assizes, in Toronto, before Galt, J., and a jury.

It was agreed that if the plaintiff was entitled to recover, the damages should be assessed at \$260.

By the evidence it appeared the plaintiff's premises were situated at the corner of Queen and Bathurst streets : that there was a common sewer constructed by the defendants extending along Queen street east and west of the plaintiff's premises, into which the plaintiff's premises were drained by means of a drain, constructed under the direction of the defendants, connecting the plaintiff's premises with the said common sewer ; also that there was a common sewer constructed by the defendants on Bathurst street north of Queen street, and also one south of Queen street, Bathurst street crossing Queen street at right angles ; but whether the sewer on Bathurst street was continued across Queen street, and was continuous or connected with that on the south, or with the Queen street

sewer, did not clearly appear. It further appeared that the Queen street sewer was constructed before the Bathurst street sewer north of Queen street. When that south of Queen street was made did not appear, except that it was made many years ago. Several side streets were drained into the Bathurst street sewer north of Queen street, and the waters coming down a natural ravine or water-course also ran into this sewer. The water in this ravine was said to be sometimes six feet deep. The dimensions or capacities of the sewers were not shown. It also appeared that from Portland street, a street east of Bathurst and of the plaintiff, the waters were drained to the west, and at Portland street there was a wall across the Queen street sewer, said to be intended, though not clearly proved, to separate the drainage west by this sewer from the drainage east. The place of outlet for the drainage east or west was not stated.

The evidence material to the right to maintain the action, without reference to the extent of injury, was as follows:—The plaintiff swore * * “We have been flooded twice. In 1878 we had some seven feet of water in the cellar, and on the 19th of March, 1881, Saturday afternoon, we had six feet and over * * After the flooding in 1878 several complaints were made. Mr. McWilliams, the city solicitor, was there and saw it, and also the city engineer. We were flooded between that time and March, 1881, but not to do any injury. I had complained to the landlord about it being damp and wet. On the 19th March we had six feet and more of water in the cellar. We sent our man down for a bag of potatoes, and he came back without the potatoes and said he could not get them—that he would be drowned. We went down and the water might be between one and two feet at that time. That was some where between three and four o'clock Saturday afternoon. It rose very fast then, it came in just in perfect gushes. It came in through the water closet, and all round the foundation. The water closet is in the cellar, connected with the drain that drains the cellar into the sewer. It

was a soft day. I could not say there was a very great quantity of snow on the ground. It was not sleighing—it had not been sleighing for some days previous. It was a steady rain, not a violent rain. I could not tell how long it had been raining when it commenced, in the forenoon, but I do not think to the best of my knowledge that there was a great deal of rain fell until about noon, because there was a man and horses out all the forenoon.”

Follis Johnson, sworn.—“ I keep a grocery store on the opposite corner of Queen street from Mr. Noble. I remember the occasion in March last, when his cellar was flooded. I did not see Mr. Noble’s cellar. I saw my own on the opposite corner. On the 19th March the water came into me. I calculated it came in from the Queen street sewer, through the pipe that connects the cellar with the sewer. I remember the flood in September, 1878. I made complaint to the city officials about the sewer at this point. I spoke to them on several occasions, both to the alderman and officials in the city offices, both on this and former occasions. I did not notice any water in my cellar from September 1878 until the 19th March. On the 19th March it was about four feet deep in my cellar, or it might be a little over. I am on the highest side of the street * * I saw the Queen street sewer rebuilding here about four years ago. I saw the city inspector there when it was building. I also saw the Bathurst sewer building north of Queen street. There had never been a sewer on Bathurst street, north of Queen street before that time—that was about four years ago. They ran a sewer on the north side of Queen street, then up Bathurst to College street, I think. They began at Queen street. The inclination is down. There were several sewers run into Bathurst street * * The creek that used to run down to Ball’s brewery has been brought into the Bathurst street sewer, that is the part of the creek that was west of Bathurst street. This was before the 19th March: the connection was made at the time the sewer was built. I do not know anything of my own knowledge of the size of the sewer on the

south side of Queen street," (probably the sewer on Bathurst street) "any more than what the city inspector said. They have admitted to me that the sewer south is not as large as it ought to be. They say it is not as large as the sewer north. The sewer was opened from Portland street up to Bathurst street about four years ago and rebuilt. At that time I understood it was so filled up that you could just about push a man's hat between the mud and the brickwork at the top. I saw the filth taken out. I understand there is a bridge—that there is a stoppage at Portland street, and that the water from there on Queen street is forced back to Bathurst street. This stoppage is to the east of the plaintiff's premises. It was just before the Bathurst street sewer north was built that this was opened * * I never had a drop of water go into my cellar until the sewer was put on Bathurst street above Queen four years ago. I do not know of my own knowledge there is any obstruction in the Queen street sewer. Mr. Craig told me there is. At the time I speak of the Queen street sewer was rebuilt. From 1878 down to the 19th March, 1881, I had no trouble from water in my cellar, and I did not hear of any other difficulties in the street on the 19th March. I believe there was a flood at the Don. I saw it in the papers. Mr. Craig is a clerk in the engineer's department."

Richard West: "I am owner of the building occupied by plaintiff. I knew of the flood. Mr. Noble sent for me to come and see it. I remember also of a flood in 1878. I have heard of no serious tendencies to flood since that time. I have seen the drains opened, but I do not know the size of them, Mr. Johnston's description of the number of sewers running into the north Bathurst street sewer is fairly correct. I think the city connected the north Bathurst street sewer with the south Bathurst street sewer. I think they connected with Queen, and I think they opened on the other side of Queen to connect with Bathurst. The water was all out except about a foot when I went there in 1881: that was the same day the

water came in. * * I paid the city, and the city contractor put it in. He connected it with the Queen street sewer, put in a nine inch drain. If anything was wrong in any way it was done by the city. We told them to give us sufficient fall for us to drain into the sewer. I applied to the city to put in the private drain which took away the water quicker. The storm of the 19th March was nothing very serious. I never heard of any flooding until the Bathurst street sewer was continued. It is four years this summer since my building was erected."

On cross-examination he said: "This Bathurst street sewer north of Queen was constructed before my building. I do not know of my own knowledge whether the Bathurst street sewer north of Queen street is connected with the sewer south of Queen street, or whether it is connected with the Queen street sewer. I don't know whether Mr. Johnston is correct as to what he said about the enormous freshet, the Don being higher than it had been for years except in one or two instances, but I enquired round Bathurst street and found the flooding was confined to this block. There was no flooding that I heard of serious between 1878 and the 19th March."

James Clough, sworn: "I am a baker. I carry on my business at the corner of Queen and Portland streets, a little way (east) from Bathurst street. I have resided there about three years, and near there for more than ten years. There is a wall right across opposite to my place in the Queen street sewer. It is just what we call a block from Bathurst street. * * When I saw this wall the ward foreman was there with men cleaning the sewer out, and I called his attention to the wall. It is a brick wall absolutely closing the whole sewer up. I asked its removal. I made a remark to those men that I would never be safe as long as that arch was there. I have been flooded twice. I was flooded in March last, and flooded three years ago. They gave no reason for the wall being there. Mr. Coatsworth, city inspector, came up to see my place, and we talked about the wall, and he did not know what was the

cause of its being there. It was a pretty steady rain on the 19th March, but nothing extra, nothing unusual. I heard of no other floodings on the 19th March except at this part of the city."

On cross-examination, he said: "I was not flooded at any time between 1878 and 1881. Nobody else was, in my neighbourhood, that I know of, between these times. I know the way the water falls in the Queen street sewer. I am not just about what may be called the height of land. They say it is a little higher below me at Denison's avenue. I am west of this wall. The water runs from my place westward. I think if the wall was not there I might have a little water from Denison's avenue, but not much. I could not say whether or not that wall was put there as being the dividing line where the water runs east and west. I have a claim against the city."

Edward J. T. Fisher: "I am a medical practitioner. I remember the time the Bathurst street sewer north was constructed. I do not personally know of the obstruction in the Queen street sewer, that has been spoken of. I have heard of it. I should not think it would require that to keep the water from running the other way if the water was on the divide. I cannot conceive the reason for blocking up the sewer like that. I know the stream was led into the Bathurst street sewer. I pointed it out to the engineer myself. I went to the City Board of Works, and to the engineer and complained of the flooding in 1878, a couple of weeks after it. There was a considerable discussion at the time about the size of the drains. I was led to suppose the drain south of Queen street was smaller than the drain north. * * My idea was, that the sewer south of Queen street was smaller than the sewer north of Queen street. My reason for thinking so was, that the water at the time of the flood flowed out of the sewer in the street that it was supposed to flow into—gushed up out of the culverts. South of Queen street there was nothing of the kind; therefore, I suppose the sewer south of Queen street was smaller than the sewer north. I pointed

this out to Mr. Shanly, and he was instructed to report, and I do not know of my own knowledge of the size of the various sewers. I remember what sort of day the 19th of March was. It was a rainy wet day. It was not a severe storm. There was about eight or nine hours' rain. I never dreamed of any such thing as a flood at all. It was not an unusual storm."

James Joliffe sworn: "I reside on Queen street * * I remember the flooding in 1881. I remember the previous flooding. I have seen no indications of flooding between these times. I have made no complaints to the city officials. I remember the storm of the 19th of March; it was not an unusual storm, it was one we might be subject to any day."

Daniel Quinlan sworn: "I am a corporation workman. I know the Bathurst street sewer—not north. I was working on the south one. I could not tell you what size the south one is. I opened it. I did not go down into it. There was a brick taken out and it was measured from there to the bottom; but I could not tell you the size of it. The city engineer, Mr. Joppling, measured it, I believe."

James Kennedy sworn: "I was once a corporation foreman. I do not know particularly about the Queen street sewers, because they were out of my line altogether. I was there when the Bathurst street sewers north of Queen were constructed. I had nothing to do with the corporation then. I was living close by. They ran it up to College street, and then turned it up on to Brunswick avenue. They connected Brunswick avenue sewer and the north side of Lippincott street; part of Arthur street also goes into it, I think not all of it. The sewer north of Queen street is about four feet and a half, I think. They let the creek into it. The creek ran from Colonel Wells's hill, from the Davenport road. It used to cross Bathurst street, and go down by Ball's brewery. They cut it off, and put it into this sewer. I saw at times five and six feet of water in it. It was draining some hundreds of acres of land. I do not know what the size of the south Bathurst street

sewer is. I remember when it was put in years ago. It was not usual then to put in as large sewers as now."

On cross-examination he said: "I do not know whether the sewer below Bathurst street" (meaning on Bathurst street below Queen street) "is as large as the one above."

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, on the the grounds that there was no evidence of negligence on the part of the defendants, or of notice to the corporation of want of repair, or that they knew the sewer was out of repair, or that the sewer had been so constructed as to contribute to the flooding of the plaintiff.

The learned Judge left the case to jury, who found for the amount agreed upon—\$260.

On the 24th November, 1881, McWilliams obtained a rule *nisi* to shew cause why the verdict should not be set aside, and a nonsuit entered, or why there should not be a new trial between the parties, on the ground that the plaintiff did not shew any negligence on the part of the defendants; and that the verdict was contrary to law and evidence.

December 7, 1881. *Bethune*, Q. C., shewed cause.

McWilliams supported the rule.

The arguments sufficiently appear from the judgments.

February 13, 1882. HAGARTY, C. J.—In the extremely unsatisfactory state in which this case stands before us, I am of opinion that our proper course is, to direct a new trial without costs.

If I uphold the plaintiff's verdict it must be on the principle that it is sufficient for the plaintiff to prove that water came into his cellar from his drain running from thence into the city drain, to establish a *prima facie* case of negligence against the defendants.

I am not prepared to agree in this.

I think a claim like this differs wholly from such cases as the breaking down of a public conveyance in which

plaintiff is a passenger, or a collision on a railway, or a train running off the line, &c.

There would be at once an apparent breach of the contract to carry safely, express or implied, or the occurrence of an accident *primâ facie* suggesting negligence or error.

Nor does the case come within the principle of *Rylands v. Fletcher*, L. R. 6 H. L. 330, so often referred to, as to being answerable for the escape of some dangerous article, as water collected by defendant on his own premises for his own use or advantage. See also *Carstairs v. Taylor*, L. R. 6 Ex. 217.

The defendants, as a municipal corporation, in the exercise of their statutable powers in the making and maintaining drains for the public benefit, health and convenience, construct a system of drains under streets, adding, extending, and altering them from time to time as the city extends. Individuals are allowed to use them for the drainage of their premises, on payment of the cost of constructing the necessary connexion, the cost of the general drainage being defrayed out of the general revenues, except where the special rate system is adopted.

It seems to me very clear that they can only be held responsible for actual negligence, and that they in no way insure parties against any possible accident, stoppage, or overflow from their works. Any one seeking to make them liable, therefore, must shew in what particular they have failed in their general duty.

I do not think that the maxim *res ipsa loquitur* applies here.

It has been properly held to apply where a passenger in a railway was injured by a brick falling from an arch made by defendant over the line: *Kearney v. The London Brighton & S. C. R. W. Co.*, L. R. 6 Q. B. 759; where a barrel of flour fell from defendant's warehouse on the plaintiff passing by: *Byrne v. Boodle*, 2 H. & C. 722; and in other cases referred to in our judgment in *Jones v. Grand Trunk R. W. Co.*, 45 U. C. 196.

In such cases the actual cause of the injury was clearly

shewn. Here the cause of the water flowing back into plaintiff's cellar was certainly not shewn, and its possible cause was merely guessed at.

In all the cases of injury from water that I have read, the plaintiff always pointed out some cause—some alleged point of neglect on which he sought to rest his charge of negligence. See *Ruck v. Williams*, 3 H. & N. 308; *Blyth v. Birmingham Water Works Co.*, 11 Ex. 781; *Whitehouse v. Birmingham Canal Co.*, 27 L. J. Ex. 25.

It is urged that this is a case in which, as in the nature of things the state of subterranean drains must be almost wholly within defendants' knowledge, the proof of an injury from an overflow of water must throw on them the burden of explaining or accounting for the cause. Such language as that used by some of the Judges in *Byrne v. Boadle*, if intended for universal application, would be in plaintiff's favour. That was the case of the barrel falling from the warehouse; and also in *Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, where the accident was of a similar kind. But it seems clear that the language applies to the kind of accident before the Court.

There is a short summary of cases in *Taylor on Evidence*, vol. i. 195, 5th ed.

In *Welfare v. London & Brighton Railway Co.*, L. R. 4, Q. B. 693, the plaintiff was injured by the fall of a plank and a roll of zinc from the portico of the railway station, and a man was seen on the roof. The Court held there was no evidence of negligence. The observation of Bramwell, B., in *Byrne v. Boadle*, 2 H. & C. 722, was cited. "The injury is done to the plaintiff, but he has no means of knowing how: the defendant has all these means, and does not think fit to tell the jury."

On this Cockburn, C. J., says, "I agree that where a thing is being done on the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done." And in the cases relied on

for the plaintiff it was also considered that in the moving of barrels or the hoisting of bales of goods, such accidents as were shewn to have occurred did not ordinarily happen without some negligence or defect of machinery.

In the cases that have occurred in our Court, such as *Scroggie v. The Town of Guelph*, 36 U. C. R. 534; *Bateman v. The Corporation of Hamilton*, 33 U. C. R. 244; *Coghlan v. City of Ottawa*, 1 App. R. 54, the plaintiff in each pointed out and relied on a special ground of negligence.

In the case now before us it seems to me that the cause (whatever it may have been) of the injury is purely a matter of speculation.

My brother Cameron has carefully stated the effect of the evidence, and shewn in what doubt the whole matter is left; and, within Lord Cairns's oft cited rule, (*Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. 197,) the Judge, I think, could not say whether any facts had been established from which negligence might be reasonably inferred. See Lord Blackburn's language in the same case, that the question for the Judge is, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

I do not see any difficulty in the present case on the plaintiff's part to have proved the position, connection, capacity, and levels of the sewers on Queen and Brock streets. This information could have been, so far as we can see, readily obtained from the city engineer's office.

At the close of the evidence, defendant's counsel objected generally that negligence had not been proved. If he had specifically called attention to the loose nature of the plaintiff's evidence as to possible causes of overflow, depending on hearsay statements, such as the suggested communication between the Brock street and Queen street sewers, and the suggested difference in the size of the sewer north and south of Queen street on Brock street, we can hardly doubt but that the learned Judge would have at once directed that point to be cleared up by calling the assistant engineer, who was said to be in Court.

From the want of precision in the objections, and the manner in which the case seems to have gone to the jury, we cannot be certain whether these suggested causes were or were not assumed to be proved, and in what shape and under what assumed state of facts it was finally presented to the jury.

If these things so suggested could have been properly assumed as proved, they might have presented the plaintiff's case in a more favourable aspect.

I think both parties are in fault, and there should be a new trial without costs.

ARMOUR, J.—The jury having found that the injury to plaintiff was caused by the negligence of the defendants, the only question for us to determine is, whether there was any evidence from which they could have reasonably so found.

The facts are simple, and the inferences deducible from them plain.

About four years before the trial of this cause, and before the construction of the sewer on Bathurst street north of Queen street—which I shall hereafter call the north Bathurst street sewer—there was a sewer which had been constructed by the defendants, running from Portland street, which lies to the east of Bathurst street and is parallel to it, westward along Queen street towards the Garfison creek, which latter sewer I shall hereafter call the Queen street sewer.

This sewer also ran eastward from Portland street along Queen street, but at or near Portland street it was completely divided by a wall, to compel the water running into it to the west of the wall to flow westward, and that running into it from the east of the wall to flow eastward.

There was also at that time a sewer, which had been constructed by the defendants, running southward from Queen street along Bathurst street to the bay, which I shall call the south Bathurst street sewer, and which was connected with the Queen street sewer at Queen street.

These sewers were, after the construction thereof, controlled and maintained by the defendants, and continued to be so controlled and maintained up to the time of the trial of this cause.

The premises of the plaintiff are situated on the south side of Queen street and on the east side of Bathurst street; those of Follis Johnston on the north side of Queen street and on the east side of Bathurst street; and those of James Clough on the south side of Queen street and on the west side of Portland street.

These several premises were drained by drains constructed from their cellars to the Queen street sewer, the drain from the cellar of the plaintiff's premises having been constructed by the defendants, who charged the expense of its construction to the plaintiff's landlord.

About four years before the trial of this cause the defendants constructed the north Bathurst street sewer, running from Queen street northward along Bathurst street to College street, connecting it with the Queen street sewer at Queen street.

Into the north Bathurst street sewer the defendants conducted sewers from Wolseley, Robinson, Arthur, Cambridge, and Lippincott streets; and from Sheppard's lane, Eden place, and Brunswick avenue.

Into it they also turned a creek which had theretofore run in a different direction, and which is thus described by a witness: "That creek ran from Colonel Wells's hill; from the Davenport road it used to cross Bathurst street and go down by Ball's brewery; they cut it off and put it into this sewer. I saw at times five and six feet of water in it. It was draining some hundreds of acres of land."

Prior to the construction of the north Bathurst street sewer none of the cellars above mentioned had ever been, nor had any other cellars in the same locality ever been, flooded by water backed up through the drains from them to the Queen street sewer; but shortly after its construction, and in September, 1878, on the occasion of a very heavy rain, the three cellars above mentioned were flooded

by water backed up through the drains from them to the Queen street sewer.

The plaintiff's cellar was again, between that date and March, 1881, flooded by water backed up in the same manner from the Queen street sewer; and the three cellars above mentioned were again, on the 19th of March, 1881, flooded by water backed up in the same manner from the Queen street sewer.

On the occasion of the first flooding of the plaintiff's cellar it was flooded to the depth of seven feet; on the occasion of the second flooding to the depth of a foot or two; and on the last occasion, the one complained of, to the depth of six feet and some odds.

The flooding on the last occasion was confined to the cellars on Queen street, between Bathurst and Portland streets.

The last flooding took place on Saturday, the 19th of March, on which day it commenced to rain in the forenoon and continued to rain for eight or nine hours, and between three and four o'clock in the afternoon the water began to flow into the plaintiff's cellar: "it raised very fast then, it came in just in perfect gushes."

After the rain ceased and the waters raised by it had subsided, the water flowed out of the plaintiff's cellar, and on Monday, the 21st of March, "it was all gone except it might be an inch or two."

These facts clearly demonstrate to my mind that the flooding of the plaintiff's cellar was caused by the bringing down by the defendants through the north Bathurst street sewer of more water than the Queen street and south Bathurst street sewers were capable of carrying away as fast as it came down. The flooding of the plaintiff's cellar was precisely what would have, under the circumstances, naturally resulted from such a cause; and there is no other cause proved, or even suggested, to which it could reasonably be attributed.

No flooding took place till after the construction of the north Bathurst street sewer: after its construction flooding

in the manner above described took place: it took place at and near to the point of its connection with the Queen street sewer; large quantities of water were brought down it, including a creek liable to be much swollen by rain; after the rain began and the waters coming down it increased in volume the flooding of the plaintiff's cellar commenced; after the rain ceased and the waters coming down it decreased in volume the flooding of the plaintiff's cellar decreased also.

The bringing down by the defendants of more water through the north Bathurst street sewer than the Queen street and south Bathurst street sewers were capable of carrying away as fast as it came down, was clearly negligence on their part, and I think the finding of the jury was therefore well warranted.

I think, moreover, that these sewers having been constructed by the defendants, and being under their control and management, the very happening of the event—the flooding of plaintiff's cellar by these sewers, standing by itself—was *primâ facie* evidence of negligence to charge the defendants.

In *Scott v. The London Dock Company*, 3 H. & C. 596, the Court say: "There must be reasonable evidence of negligence; but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." And I think what is thus laid down is in principle entirely applicable to the present case.

I also refer to the *Cataraqui Bridge Co. v. Holcomb*, 21 U. C. R. 273, and to *Braid v. G. W. R. Co. of Canada*, 1 Moore P. C. N. S. 101, in addition to the cases referred to by the Chief Justice.

I have deemed that the facts which I have hereinbefore stated sufficiently demonstrated that the Queen street and south Bathurst street sewers were incapable of carrying

away the water brought down by the north Bathurst street sewer as fast as it came down, and have not therefore adverted to the evidence of witnesses as to such incapacity ; but on this point there is the following evidence given by Follis Johnston :

“Do you know anything of the size of the south side of Queen when it was first built?” “I do not know anything of my own knowledge, any more than what the city inspector said. They have admitted to me that the sewer south is not as large as it ought to be ; they say it is not as large as the sewer north.”

This evidence, it is to be remembered, was not the result of the examination of Follis Johnston by the plaintiff's counsel, but was elicited from him by the cross-examination by the defendants' counsel, who could have called witnesses to contradict it, if it was capable of contradiction, but who did not do so, leaving it to be inferred that it was incapable of contradiction. Under these circumstances I am unable either to refuse it belief or to criticize it-away.

In my opinion the rule should be discharged, with costs.

CAMERON, J.—Unless the fact that water came into the plaintiff's cellar connected with the defendants' common sewer, coupled with the fact that other cellars in the neighborhood were similarly affected, furnished evidence to be submitted to the jury of all or any of the causes of action set out in the plaintiff's declaration, there was nothing to show a faulty construction of the defendants' sewers, or that they were negligently allowed to get out of repair, or notice to them that they were so out of repair. The plaintiff's first ground of complaint against the defendants is, that they negligently and improperly suffered the drains or water-courses to be out of repair for a long time, and to be choked and stopped, so that the courses of the said drains or sewers were changed into a different course or channel, and by reason of the said blocking up of the said original drains or sewers, quantities of the water and filth received into the same burst them and flowed into his

cellar, and damaged his goods. This admits an original construction of the drains with sufficient care and skill and of sufficient capacity to answer the purpose for which they were constructed, and rests the plaintiff's right to recover on the negligent and improper suffering the drains to be out of repair, choked, and stopped; and of this the only evidence is, that in the year 1878, during a heavy and extraordinary freshet, water flowed into the plaintiff's cellar and other cellars on Queen street in the plaintiff's neighborhood; that in a short time the water flowed away, and from that time until the 19th March, 1881, when the overflow took place, no inconvenience was felt by the plaintiff or others. No one who was called as a witness could say what caused the overflow. It was by some conjectured that the sewer on Bathurst street, south of Queen street, was of smaller dimensions and capacity than the one on the north, and that the large volume of water brought down by the northern sewer was penned back by the smaller. If there had been evidence to sustain this conjecture, it would not have been applicable to this ground of complaint, but to that in the third count. By others it was established that at or in the immediate neighbourhood of Portland street, a point on Queen street, there was a solid brick wall completely cutting the Queen street drain in two. This wall would seem to have been part of the original construction, and designed as the point at which the water-shed to the east and west began, the sewer east of this wall conducting the water eastward, and the sewer west to the westward. From the evidence of the witness Clough, who speaks positively of this wall, as having seen it when the sewer was being cleaned out and reconstructed westward some four years ago, there is no doubt the flow of the water from this point is westward. In fact this wall was practically the beginning of the sewer that drains the plaintiff's premises by means of his connecting drain. Under these circumstances the existence of this wall cannot be regarded as furnishing evidence of negligently and improperly suffering the drain to

be choked and stopped ; and there was nothing shown in evidence from which it could be inferred that this wall could in any manner have conduced to the injury complained of, as the design of the sewer was to take the water from, not to this point, and the fall was from it.

The second count presents the cause of action in the same way as in the first, with the addition of the allegation that the negligence was gross, and that the defendants had notice of the sewers being out of order. The evidence applicable to the one is applicable to the other. The defendants had notice of the flooding in September, 1878, and apparently then made an examination, with what result does not appear ; but the fact does that from that time until the time the plaintiff received the present injury there has been no flooding, and I think it cannot be inferred that there was an obstruction in 1878 of which the defendants had notice, and that obstruction had continued ever since. The evidence does not show what was the nature or cause of the obstruction in 1878. If it was the faulty construction and insufficient capacity of the sewers, as was the conjecture of Dr. Fisher, the second count does not, any more than the first, cover the ground of complaint ; and this brings me to the consideration of the third count, which is wide enough to cover an original faulty construction or a negligent suffering the sewers to be out of repair. What I have already said furnishes the answer to the claim in respect of the want of repair, and the plaintiff's right to recover in the present action must depend upon the question whether there has been any reasonable evidence to be submitted to the jury that the sewers were originally insufficient of capacity, or otherwise deficient in construction, and if so, that such want of capacity or defect caused the damage to the plaintiff that he complained of. It does not appear when the Queen street sewer was constructed, what its dimensions are, or where its outlet is. It appears it was opened up some four years ago, and reconstructed to Bathurst street. It was then also cleaned out, The witnesses put this before the flooding in 1878. It

also appears that the Bathurst street sewer, north of Queen street, was constructed about the same time: that the depth of this sewer was four feet and a half: that it receives the drainage of a large section of the city, and that a creek, sometimes containing from five to six feet of water in depth, enters it at a point north of Queen street; but whether it enters the Queen street sewer or not, or is carried under it or over it to join the older sewer on Bathurst street, is not made to appear; or whether, as the fact may be, that the Bathurst street sewer, south of Queen, is part of, and a continuation of, the Queen street sewer. The only evidence that at all bears upon the point, unless the fact of the overflow itself of the drains on Queen street can be said to be evidence of it, is what is stated by the landlord of the plaintiff's premises, Richard West, which is as follows: "Q. Have the city connected the north Bathurst street sewer?" A. "I think they did. I think they connected with Queen, and I think they opened on the other side of Queen to connect with Bathurst." And in cross-examination he said: "I do not know of my own knowledge whether the Bathurst street sewer, north of Queen street, is connected with the sewer south of Queen street, or whether it is connected with the Queen street sewer."

This is not evidence of the fact, but of the opinion or belief of the witness, and it is difficult to understand from the statement what according to his belief really was done. If it means that the north Bathurst street sewer was connected with the Queen street sewer, which was then opened through and connected with the sewer on Bathurst street south of Queen, it would indicate that the Queen street sewer was not originally connected with this sewer. It may be that the joining two large sewers at right angles would be a faulty and unskilful construction; at all events, if the dimensions or capacities of the sewer were equal, or nearly so as it is possible, the two volumes of water coming together would cause the water to be penned back. It would also be faulty and unskilful to connect two sewers of large capacity with one of smaller

capacity. It was determined in *Coghlan v. The City of Ottawa*, 1 App. 54, that where the plaintiff had a drain from his premises sufficient to drain them, which had become part of the city drainage system, and the corporation connected therewith two other drains, which brought to the plaintiff's premises a large quantity of water, by reason of the smaller or original drain being unable to carry the increased quantity away, that the defendants were liable, expressly, as I understand it, on the ground that the defendants had brought the water doing the damage to the plaintiff's premises. Patterson, J. A., in delivering the judgment of the Court, said: "A good deal of apparent difficulty will be got rid of by looking at the case as it is put in the second count, where the charge is, that the defendants by means of their drains conducted water to the plaintiff's premises without providing an adequate escape: this is really the essence of the charge. How is it met? The answer attempted seems to be, that the defendants relied upon the plaintiff's drain being sufficient to carry away all the water that was likely to be brought there by the two drains, which were together more than double its capacity. The jury said this was negligence, and in my opinion it is only a matter of words whether we say the negligence consisted in connecting two large drains with one smaller one, or in failing to provide for the escape of the water which the two drains were capable of bringing."

In the present case the drainage system for the part of the city in which the plaintiff's premises are had been established as it was at the time of the damage before the plaintiff's drain was constructed, and in this respect differs from *Coghlan's* case, and the plaintiff is therefore obliged to show some act of negligence in omitting to remove some obstruction, which has caused the damage, of which the defendants had notice, or some original unskilful or faulty construction of the sewer, and the mere fact of an unusual quantity of water being poured upon his premises is not evidence in itself of either.

It was proved that a considerable creek or stream of water

was diverted from its natural channel into the Bathurst street sewer, with the view of shewing that a very large volume of water is brought down that sewer, a fact of no importance without shewing that the water so brought down had an injurious effect upon the plaintiff; in other words, conduced or helped to conduce to the damage he has sustained. It is manifest the Bathurst street sewer could not convey more water than it was capable of receiving; and the quantity of water entering it is of no importance in this case without it was also shewn by evidence, sufficient to be submitted to a jury, that this sewer was connected with the Queen street sewer, and that the latter sewer had not capacity sufficient to carry away the water conveyed to it by the former, and the water of which it is the proper conduit.

In *Bateman v. The City of Hamilton*, 33 U. C. R. 244, a case in many respects similar to this, this Court, as it was then constituted, directed a nonsuit to be entered where the facts were quite as strong against the defendants as they are in this case. Morrison, J., in delivering the judgment of the Court, said: "The burden of proof was on the plaintiff to establish the allegations in his declaration, to shew that the injury complained of was attributable to the negligence of the defendants, or the neglect of some duty cast upon them. It was incumbent on the plaintiff to shew affirmatively that the culvert in question and the embankment through which it passed were constructed or made by the defendants, and if so, that they constructed it with insufficient opening or capacity, or otherwise in so defective or improper a manner that it impeded the free flow of water passing down the natural ravine or water course in question, or that they allowed it to be out of repair, obstructed or improperly maintained, and so unfit for the purpose designed * * Assuming that there was a duty cast upon the defendants to keep this culvert free from rubbish thrown into the ravine, and carried down from time to time by the flow of water into the culvert—a point upon which I desire to express no opinion—the evidence at the trial failed to establish a case against the defendants

upon that ground. There was evidence given by one or more witness that upon an inspection of the culvert, some time after the backing of the water to the plaintiff's premises, it was found partially obstructed by mud, &c., washed into it, and partially by a coping stone which had fallen and lay at the entrance of it. It did not appear, however, when the mud accumulated in the culvert, or when the stone fell at its mouth. The mere existence of these obstructions was not enough in my opinion to establish negligence. There was no evidence that the defendants or their officers had any notice of these obstructions, nor did it appear that they were of so notorious a character, or had continued so long, as to charge the defendants with constructive notice of them."

The difference between that case and the present is, it was not proved or admitted in that that the defendants had built or were liable to keep the culvert in repair, while in this the defendants admit they were responsible for the sewers. It appeared however that the culvert was across a road that the defendants controlled and improved. There the cause of the obstruction was apparent, here it is left to conjecture. The rule imposing the burden of proof on the plaintiff, as to which there can be no doubt, there clearly laid down, is the rule that should govern this case; and it appears to me the plaintiff has wholly failed to give any evidence from which it may be inferred what was the *causa causans* here.

The liability of municipal corporations to make good damage resulting from sewers is not a statutory liability: if it exists at all, it is under the common law, and it is now too late to assert it does not exist in the face of the authorities upon the subject; but these authorities, as far as I am aware, shew there must be some act of negligence. A sewer ought, I think, to stand in a very different position from a highway with respect to responsibility for injuries caused thereby. A highway is for the use of all, while sewers are for the benefit of special properties and streets; and when maintained at the expense of the general

rate payers the burden upon them is sufficiently onerous without the general rate payers being made responsible for injuries resulting to the persons directly benefited by such sewers, without its being clearly made to appear that the agents, so to speak, of such general rate-payers—in other words, the officers of the corporation—have committed some act or neglected some duty within the scope of their authority, which has led to the injury to be compensated. A sewer is an expensive work, it is in general underground out of sight, and it must be constructed with reference to the means possessed by the corporation to build it, and the requirements of the area to be drained. They could not be required, as matter of duty or obligation, to be constructed of such dimensions as to permit a man to enter and make frequent inspections and thus be readily kept in order. When not of such dimensions, such general inspection is impossible, and to make frequent openings in the walls has a tendency to injure and impair the stability of the sewer itself. It is not then until an obstruction has manifested itself by an overflow that the corporation can be made aware of its existence, and if injury results to a person who has been enjoying the beneficial use of such convenience, it is more reasonable that he should bear the loss than that others who have no direct benefit from the sewer should be compelled to share it with him, unless there has been some culpable neglect or breach of duty on the part of the corporation, for which the general rate payer is responsible ; and that the burden of shewing such neglect or omission should rest upon the party claiming to be injured thereby. The plaintiff's drain was constructed by the defendants under their by-law requiring all private connecting drains to be constructed under the direction of the proper officer of the corporation ; and if it had been unskilfully or negligently constructed, and so led to the plaintiff's damage, the defendants would very clearly and properly be held liable, as was decided in the case of *Reeves v. These Defendants*, 21 U. C. R. 157. But there is no complaint made by the plaintiff of the construc-

tion of this drain. The case is rested entirely on the ground of improper construction of the main sewers, or the existence of some obstructions, of which the defendants ought to have been aware and negligently omitted to remove. I think there was no evidence given at the trial reasonably tending to support either of these grounds, and therefore a nonsuit ought to have been entered at the trial, and the rule to enter such nonsuit should now be made absolute with costs.*

In arriving at this conclusion I have not overlooked the evidence of Follis Johnston, in reference to the size of the drain. He said as to this, "I do not know anything of my own knowledge, any more than what the city inspector said: *They* have admitted to me that the sewer south is not as large as the sewer north." Who the "they" referred to is, does not appear; and it was not therefore shewn that the person or persons making the admission could bind the corporation by such an admission. Assume that a man sent by the corporation to measure a sewer, gave, while doing so, the dimensions, such statement would not, without calling the party, be evidence against the defendants in a case like the present. The statement of Mr. Craig to the same witness, Mr. Craig being only a clerk in the engineer's office, that there was an obstruction in the Queen street sewer, would be inadmissible, but as the obstruction referred to the wall at Portland street, it is unimportant. The very large claim originally made by the plaintiff, amounting to \$922.78, which, when it comes to trial, he is willing to reduce to \$260, shews that he has not a very nice appreciation of what is just, in thus seeking to obtain, from those who in no manner were more guilty than he was himself of the alleged wrong, so large an amount beyond his actual loss. So exorbitant a claim, as the law now stands under the Judicature Act, might very well be considered a ground for depriving him of costs, if he were entitled to retain his verdict.

Rule absolute for new trial, without costs.

* CAMERON, J., subsequently withdrew his judgment, so far as the nonsuit was concerned, in order that there might be another trial.

HULDAH WILSON V. ROSE ANN GILMER AND ELLEN READ.

Ejectment—Lease for life—Construction of—Exception in grant.

R. G., being seised in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard and dwelling-house, after the decease of his beloved wife, J. G.," to hold to his daughters for and during their lives, or the life of the survivor of them, at the yearly rent of 20c., if demanded. Ten days afterwards he conveyed in fee to his son W. G. the land of which the three acres formed part, the son having actual notice of the agreement between his sisters and R. G. Subsequently W. G. conveyed to the plaintiff, "subject to the right of [R. G.'s wife and daughters] to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to a mortgage, which the plaintiff agreed to pay off. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres.

Held, that the agreement by which R. G. intended to demise the three acres, created a term at once, the wife of R. G. retaining the right to occupy during her life.

Held, also, that the words "subject to," &c., in the conveyance to the plaintiff, either operated as an exception, or, by reason of the execution of the deed by the plaintiff, as a re-grant of the three acres to her vendor. In either case, therefore, the plaintiff was entitled to succeed.

Quære, also, if the deed operated as a re-grant to W. G., whether, if the lease were void, as contended, as creating a freehold interest to commence *in futuro*, W. G., having notice of his sisters' claim under it, would not be restrained from disturbing them.

EJECTMENT for the south or front three acres of lot 28 in the first concession of Pickering.

Equitable plea: That defendants were entitled to the premises for life under an agreement made with Robert Gilmer prior to the date of the deed from him to William Gilmer, for valuable consideration, which the defendants had duly observed, and of which plaintiff had notice.

The plaintiff claimed under deed from William Gilmer, who claimed from the patentee. The defendants denied plaintiffs' title, and asserted their own under lease from Robert Gilmer to them, dated 16th September, 1871.

On this date Robert Gilmer (being seised in fee) demised to his daughters, the defendants, in these words: "Hath demised and leased, and to farm let three acres of land in the front of his homestead, being part of the west half of the lot of land number 28 in the 1st concession of the said township of Pickering, with right of way to the pump

well at the barn, and regress therefrom, including his orchard and dwelling-house, after the decease of his beloved wife Jane Gilmer, to hold to said lessees for and during the full term of their natural lives, or the survivor of them, yielding and paying unto the said lessor, his executors or administrators, the yearly rent or sum of 20c., if demanded only." The lessees covenanted that they would not sub-let, except to his son William, or his heirs. The lessors covenanted for quiet possession.

The lease was executed by all parties, and was registered 2nd of March, 1872.

On the same 16th of September, 1871, a mortgage was executed by Robert Gilmer, for \$2,400, to the defendants and to Mary Carson, Elizabeth White, Priscilla Thomson, and Jane Carr, on the west half of the lot.

On the 26th September, 1871, Robert Gilmer conveyed in fee to William Gilmer the south-west quarter of 28 in the 1st concession, fifty acres, more or less, in consideration of natural love and affection and \$1, with covenants against any encumbrance, and that the grantor had not encumbered.

On the 21st February, 1876, an agreement was made between William Gilmer and Robert Gilmer and his wife, by which William bound himself to grant and pay to Robert and his wife, his father and mother, for their sole use and benefit, three acres on the south end of 28, with all houses and buildings thereon contained, during the term of their natural lives, each or any one of them; said three acres to be laid off across the front and south end of said lot, and a fence to be put on the north of said three acres; also to have the privilege of the pathway to the well north of said lot and enclosed on the premises leased to the Thompson family; and he further bound himself to pay Robert and Jane Gilmer, or either of them, \$110 each and every year during the term of their natural lives, or either of them.

On the 19th March, 1880, William Gilmer and wife conveyed in fee to the plaintiff, for \$3,400, the south 50 acres

of the west half of 28, in the 1st concession, "subject to the right of Jane Gilmer, the mother of the said William Gilmer, and of his sisters Rose Ann Gilmer, and Ellen Gilmer (now Ellen Read,) to occupy the house and three acres of the south end during the life of them, or the survivor of them, and the right to and from the well upon the said land ; subject, also, to a mortgage for \$2,400, given to Ellen Gilmer, Rose A. Gilmer, Mary Carson, Elizabeth White, Priscilla Thompson, and Jane Carr, which mortgage the party hereto of the third part (the plaintiff) agrees to pay off, satisfy, and discharge, and the amount so paid is to be considered as part of the within mentioned purchase money."

This deed was executed by the plaintiff, and was registered 20th March, 1880.

The trial was at Whitby, before Galt, J., when a verdict was entered for the defendants, the learned Judge finding that the grantor, William Gilmer, had notice of the lease before the deed to him was executed: that the plaintiff, through her agent, had notice of the lease when she bought the land; and that she took the deed subject to the provisions of the lease.

November 18, 1881.—*H. Cameron*, Q. C., moved to enter a verdict for the plaintiff on the law and evidence, the plaintiff having proved title to the land in question, and the reservation in the deed to plaintiff vested no estate in the defendants, and was no defence ; or for a new trial, for misdirection, in ruling that defendants had a good defence under the reservation, and in refusing evidence that defendants had no such estate in law, and to explain said reservation.

December 5, 1881.—*MacLennan*, Q. C., shewed cause, citing 2 *Sugden* on Vendors, 14th ed., 752; *Doe Potter v. Archer*, 1 B. & P. 531; *Smith v. Widlake*, L. R. 3 C. P. D. 10; *Leith's Blackstone*, 163, and R. P. Stats. 90, 91; *Williams's R. P.* 168; *Shep. Touch*, 222; *Smith R. & P. Prop.* 710, 721, 773, 774, 941.

Bethune, Q. C., contra. The grant being made to the plaintiff bound her to pay off the mortgage. The lease for twenty cents was not one for value, and cannot be enforced in equity as a declaration of trust, nor be reformed. Then, the covenant is of no validity at law; and when equity is resorted to, the difficulty is met with, "you are a volunteer, and equity will not aid a volunteer." See *Mulholland v. Merriam*, 19 Grant 288.

The lease cannot be considered as a bargain and sale, and does not come under the statute.

Nor is the plaintiff estopped by the clause in the deed, as it was put there only to save the grantor from any trouble about possession.

February 13, 1882. HAGARTY, C. J.—At the trial, it was found (and we think correctly) that William Gilmer took the conveyance from his father in 1871, with notice of the lease to his sisters executed a few days before.

The plaintiff had actual notice also, independently of the mention of the claim in the deed to her. It was also found that William took the conveyance from his father subject to the provisions of the lease.

The main argument in favour of the plaintiff was, that the lease was void as creating a freehold interest commencing at a future period.

It was also urged that it could not prevail against the deed to William, which was registered before it.

I do not think the registry laws will much affect the decision of the case.

If it were necessary, I should hold that William, on the evidence before us, was a volunteer, as between him and his father and the lessees under the lease, although subject to the \$2,400 mortgage. He swears that he did not give his father anything for this 50 acres; that he was not to give him anything for it: that his father offered it to him, saying he might as well have it.

He had previously to this got a deed from the father of the other 50 acres, and he says he agreed when he got that that he was to support his father for life.

He afterwards said that for the last 50 acres he was to pay a debt of \$200, and also \$70 due to one Little; and that he had paid this. The circumstances were peculiar as to the time and manner in which he got this last deed.

The conveyance to him is merely for natural love, and \$1.00. As regards his father's equity of redemption in the land, he was giving it to Robert for a nominal consideration. The registry law, sec. 74, avoids the unregistered deed "against any subsequent purchaser or mortgagee for valuable consideration *without actual notice*."

We must now see if this lease be really void, as argued. There can be no doubt of the intention of the contracting parties, and, if possible, it is our duty so to construe it as to effectuate, not to defeat such intention. The words used are those of present demise; the premises are described and a right of way given; and then come the words, "including his orchard and dwelling-house, after the decease of his beloved wife, Jane Gilmer."

The orchard was on the three acres, so was the dwelling house; the orchard was most likely fenced in, but it would seem as if the three acres demised were not actually enclosed but merely "chained off."

There is no formal *habendum* in this lease to commence at a future day, or on the wife's death: the words are general and direct, as if a present interest were passing.

I do not see why we may not read it, or rather why it may not be, in its true meaning, read as presently demising the three acres, but reserving to the lessor's wife the use of the orchard and dwelling house. The wife and daughters (lessees) were all then living in the house.

Then, it may be asked, is the orchard and dwelling house demised at all, or any term or interest in either of them given to the lessees, except from the death of the wife?

I think we may hold that a term is at once created in the whole three acres, the wife retaining the right to occupy during her life the house and orchard.

The oft quoted words of Willes, C. J., in *Parkhurst v.*

Smith, lessee of Dormer, Willes, 332, may here apply: "If the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. * * * It is the duty of the Judges (and this is that '*Astutia*' which is so much commended by Lord Hobart, p. 277) to endeavour to find out such a meaning in the words as will best answer the intent of the parties."

Again, in *Roe Wilkinson v. Tranmarr*, at page 684: "The Judges in these later times, (and I think very rightly,) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it." (Cited with approval by Parke, B., *Doe Lewis v. Davies*. 2 M. & W. 516.)

See this doctrine fully noticed in *Hartman v. Fleming*, 30 U. C. R. 212.

Lord Ellenborough says, in *Chetham v. Williamson*, 4 East, 475: "There is no magic in words, and instances occur in which a proviso, coupled with and explained by other words, was held to operate as a word of grant."

If this view, supporting the lease, cannot be upheld, we would have to consider the plaintiff's title under the deed from William Gilmer.

In the granting part, the premises are described as subject to the right of Jane, the mother of the present defendants, the sisters of the grantor, to occupy the house and three acres of the south end, during the life of them and the survivors of them, and the right to and from the well upon the said land.

Is this an exception to the premises conveyed, so that the right to the occupation of the house and three acres until the death of the survivor of the three persons named did not pass to the plaintiff?

An exception must be of something in existence, "which

is ever a part of the thing granted," and excluded from the operation of the grant: Co. Lit. 47*a*.

It would seem that no express form of words is absolutely necessary: "*exceptis, salvo, præter*, and the like, be apt words:" *Ib.*

"A reservation is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised:" *Ib.*; and the lessor cannot reserve to any other but to himself.

"Sometime it hath the force of saving and excepting:' *Ib.* 143*a*.

See also 19 *Viner* Ab. Reservation, B. 2; Com. Dig. *Fait*, E. 5.

I do not think we strain the law by reading this deed as in effect excepting from its operation the house and three acres during the life estate.

The conveyance would then read, according to what would seem to be the plain intent of the parties, "I convey the fifty acres to you, but I except therefrom these three acres until the expiration of the existing life estate therein of A. B.," &c. The whole fee of the land can pass at once

But there is another difficulty in plaintiff's way.

She is an executing party to her deed, and according to the authorities it would appear that it operates as a grant or regrant by her to the vendor of an estate or interest in the premises conveyed.

This is assuming that there has not been a valid exception.

In *Wickham v. Hawker*, 7 M. & W. 113, Vidler and Cox were seised in fee, in trust for R. Widmore. The three joined in a deed to Wade, "excepting and always reserving out of said release and conveyance unto the three, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon said premises, &c., and there to hunt, hawk, fish, or fowl, at any time hereafter."

Vidler and Cox were the conveying parties. It was argued that Widmore was a mere stranger to the deed.

The case is fully argued, and the judgment is delivered

by Parke, B. He says that the liberty of hawking, hunting, &c., so far as related to Widmore, could not be a good exception or reservation, because he was not a conveying party to the deed, nor was such a privilege properly, and in correct legal language, either an exception or a reservation. He refers to *Doe Douglas v. Lock*, 2 A. & E. 743, where most of the authorities are collected, and where Lord Denman says, that such a privilege is neither an exception nor reservation, but only a privilege or right granted to the lessor, though words of reservation or exception were used. He then proceeds: "As the indenture was executed by Wade (the grantee) the words of reservation or exception operated as a grant by him to the three—Widmore, Vidler, and Cox."

Alderson, B., (p. 72,) says: "This is not at all a reservation properly so called, but a grant."

Parke, B.: "According to *Doe Douglas v. Lock*, reservations, properly so called, are only of rents or services, and a reservation of an easement or privilege, *whether to a stranger or not*, operates as a fresh grant."

Erle, in arguing, says: "If in a conveyance from A. to B. there is a reservation to C., a stranger, it clearly cannot operate as a reservation, and it will therefore, if it be possible, be construed as a grant."

In *Durham and Southampton R. W. Co. v. Walker*, in Error, 2 Q. B. 967, Tindal, C. J., cites these two cases as declaring the law.

1 *Dart's V.* & P. 540, cites the cases, adding: "In many cases what purports to be an exception or reservation will be held to operate as a fresh grant."

In *Moor v. Lord Plymouth*, 7 Taunt. 625, also a case of right of hunting, &c., Gibbs, C. J., as to the objection that the reservation was not to persons from whom the estate moved, says: "The deed may operate as a grant; and though it may not be good as a reservation, yet being sealed with the seal of all the parties, it would operate as a grant to a party to the deed who owned the equity of redemption."

It is of course fatal to plaintiff's right to recover if the

effect of her deed be, either that a life interest in the three acres has been excepted from its operation, or that she has regranted to her vendor such an estate, or interest, or right of occupation.

If the latter view be the correct one, it would leave these defendants to deal with William Gilmer.

He took the estate with actual notice of their claim, and it would then have to be determined whether, if the lease were void, he would be restrained from disturbing them, on the doctrine said to exist in equity in *Smith v. Widlake*, L. R. 3 C. P. D. 15.

It is stated by Cotton, L. J., as amounting to this, that "where a fee simple is granted subject to a void lease for years, and the grantor has contracted to create a term for years, or is liable to an action at the suit of the intended lessee if the latter be ejected from the land agreed to be demised to him," then the grantee, "taking with notice, is bound to complete the contract or to indemnify his vendor against the action; or, in other words, is bound to save him from being sued."

This equitable right is laid down as established by a very imperfectly reported case in 2 Vernon (Prettyman's case), cited in *Walton v. Stamford*, Ib. 279.

The doctrine is not laid down with confidence, the facts of the case not raising such an equity.

It was pointed out that the grantor of the fee, though he sold subject to the void lease, was not liable to an action for breach of the covenant for quiet enjoyment, and could not be sued by those who represented the original lessee.

On the whole case, I am of opinion that our judgment should be for the defendants.

I think we may construe the lease as a present grant of a freehold interest.

I also think that in the deed to the plaintiff the three acres are either excepted from the operation of the conveyance or re-granted by the grantee to the vendor.

It may be further that defendants can be protected under the equitable doctrine suggested in *Smith v. Widlake* already noticed.

ARMOUR, J.—I think that the words “subject to the right of Jane Gilmer, the mother of the said William Gilmer, and of his sisters Rose Ann Gilmer and Ellen Gilmer (now Ellen Read) to occupy the house and three acres of the south end during the life of them, or the survivor of them, and the right to and from the well upon the said land,” contained in the deed from William Gilmer to the plaintiff of the south fifty acres of the west half of lot 28, 1st concession, Pickering, which deed is executed by all the parties to it, operate as an affirmance by the parties to that deed of the existence of the said right, and constitute an exception of that right out of the premises by that deed conveyed.

The words “subject to” may, in my opinion, be properly treated as words of exception, and I so treated them in *Lapointe v. Lafleur*, 46 U. C. R. 16.

This view disposes of the plaintiff's right to recover possession of the house and the three acres, which is the controversy in this suit; but in adopting it, I do not mean to dissent from any of the views taken by the Chief Justice in his judgment.

CAMERON, J., concurred with Hagarty, C. J.

Rule discharged, with costs.

REGINA V. JAMES CHUTE.

Indecent assault—Evidence of subsequent conduct—Admissibility of.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault, evidence was tendered of the conduct of the prisoner towards her subsequent to the assault.

Held, that the evidence was admissible as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged.

Per HAGARTY, C. J., and ARMOUR, J.—The evidence was properly admissible as evidence in chief.

CASE reserved from the General Sessions for the County of Norfolk, held at Simcoe on the 15th day of December, 1881.

The prisoner, a school teacher, was being tried upon an indictment for an indecent assault upon one of his scholars, a girl of about thirteen years of age, during school hours.

The assault was proved to have taken place on the 15th day of February, 1881.

The prisoner forbade the prosecutrix telling her parents what he had done, and they did not hear of it until some two months after the assault, when they took her away from school.

After the prosecutrix had given evidence of the assault the County Attorney proposed to ask her about the conduct of the prisoner towards her subsequent to the assault.

The learned Chairman at first declined to receive evidence of the prisoner's subsequent conduct, but the counsel for the prisoner endeavouring to show, by the cross-examination of the prosecutrix, that it was highly improbable that the prisoner would commit or attempt to commit an indecent assault during school hours, he allowed the evidence to be given, and the prisoner was convicted. He thereupon reserved for the consideration of this Court the question of the admissibility of such evidence.

February 13, 1882. *Irving*, Q. C., for the Crown, referred to *Regina v. Rearden*, 4 F. & F. 76; *Rex v. Nichol*, R. & R. 130; *Rex v. Lloyd*, 7 C. & P. 318.

No one appeared for the prisoner.

March 8, 1882. ARMOUR, J.—It does not appear upon the case reserved, as it should appear, whether the evidence objected to was given upon the cross-examination of the prosecutrix, after her cross-examination and before she had left the witness stand, or whether she was allowed to be re-called for the purpose of giving it, or whether it was given for the purpose of contradicting or explaining what had been elicited from her upon her cross-examination, or what evidence of the prisoner's subsequent conduct had been elicited from her, and by what questions it had been so elicited upon her cross-examination, or what the evidence objected to was, or by what questions it was elicited.

In *Rex v. Lloyd*, 7 C. & P. 318, the prisoner was tried at the Carmarthen Assizes in 1836, before Patteson, J., on an indictment for an assault with intent to commit a rape, and for a common assault.

The assault having been proved by the prosecutrix counsel for the crown proposed to give evidence of liberties having been taken with the prosecutrix by the prisoner on a former occasion, in order to shew the prisoner's intent towards her.

Patteson, J. : "All the cases in which evidence of this kind has been admitted, have been cases of malice. I cannot find any case in which evidence of former conduct has been admitted to shew a lustful intent. I think that I ought not to receive the evidence."

In *Regina v. Mary Ann Geering*, 18 L. J. M. C. 215, the prisoner was indicted at the Lewes Summer Assizes, 1849, for the murder of her husband, Richard Geering, in September, 1848, by administering arsenic to him. The prisoner was also charged in three other indictments for the murder of her son George by arsenic, in December, 1848; of another son James by arsenic, in March, 1849;

and of an attempt to murder another son Benjamin, in April, 1849, by arsenic. In April, 1849, Benjamin stated to the surgeon who attended him that his symptoms were precisely the same as those exhibited by his deceased father and his two brothers, and this statement having been reduced to writing, and read over to the prisoner, she said "it is quite right."

On the part of the prosecution evidence was tendered consisting of a medical post mortem analysis of the intestines, of the contents of the stomach, of the heart, &c., of the husband Richard, of James and George, and also of a medical analysis of the vomit of Benjamin, who was still alive, with a view to show that arsenic had been taken into the stomach of the three latter parties above mentioned, that two of them had died of poison, and that the symptoms of all the four parties were the same. Evidence was also tendered that the four parties during their lives lived with the prisoner and formed part of her family: that she generally made tea for them, ordered their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. Objection being made to the reception of the above evidence, Pollock, C. B., said: "I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the death of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony. My brother Alderson concurs with me in thinking that the evidence ought to

be received." He afterwards intimated to the prisoner's counsel, that Alderson, B., and Talfourd, J., concurred with him in thinking that he ought not to reserve the point. The prisoner was convicted and executed.

In *Regina v. Garner et ux.*, 3 F. & F. 681, also more fully reported in 4 F. F. 346, the prisoners were indicted for the murder of Garner's mother by poison. The prisoner Garner had been previously married, and his former wife had died in March, 1861, his present wife then living with them as a servant. The prisoner Garner's mother had resided with him after his second marriage. Her death took place in December, 1861, and it was clearly proved that she died of arsenic. The male prisoner sold arsenic for agricultural purposes. He also sold milk. There was evidence of administration by the prisoners of articles of diet in which arsenic might be contained, as arrow root, &c., and of arsenical symptoms following. There was, however, evidence that three horses (one of them the prisoner's own) had been accidentally poisoned by arsenic, and that some of his customers and persons against whom he was not suspected to have any feeling had suffered from arsenical symptoms, evidently arising from some accident. To prove the wilful administration in this particular case it was proposed, on the part of the prosecution, to give in evidence the circumstances which had attended the death of the male prisoner's former wife, and to shew that she had died of arsenic.

Willes, J., after consulting Pollock, C. B., as his colleague in the commission, admitted the evidence.

In *Regina v. Mary Ann Cotton*, 12 Cox C. C. 400, the prisoner was indicted at the Durham Spring Assizes in 1873, for the murder of her son Charles Edward Cotton on the 12th of July, 1872, by poison. Evidence was tendered of the death by poison of another son of the prisoner on the 10th of November 1872, and of another son on the 28th March, and of a man named Mattrass, on the 1st of April, who then lodged with the prisoner.

Archibald, J., after consulting with Pollock, B., admitted

the evidence on the authority of *Regina v. Geering* and *Regina v. Garner*, and refused to reserve a case.

In *Regina v. Harriet Roden*, 12 Cox, C. C., 630, the prisoner was indicted at the Shrewsbury Summer Assizes, 1874, for the murder of her infant child. The prisoner was a woman crippled and very helpless from rheumatism. The deceased, an infant of nine days old, died of suffocation while in bed with her and on her arm during the night. Counsel for the prosecution tendered evidence to prove that the prisoner had had four other children who had also died in infancy at early ages.

Lush, J. : "The value of the evidence cannot affect its admissibility. The principle of *Regina v. Cotton* applies. The Lord Chief Justice and I were consulted upon the point in that case by my brother Archibald before the trial, and having considered it, we were clearly of opinion that the evidence was admissible. I think the evidence now tendered may be received." In *Regina v. Ellen Heesom*, 14 Cox C. C. 40, similar evidence to that admitted in *Regina v. Geering*, *Regina v. Garner*, *Regina v. Cotton*, and *Regina v. Roden*, was admitted by Lush, J.

It is to be observed that in *Regina v. Thomas Winslow*, 8 Cox C. C. 397, the prisoner was indicted for murder by poison at the Liverpool Summer Assizes, in 1860, and Martin, B., after consulting with Wilde, B., determined not to admit similar evidence to that admitted in *Regina v. Geering*.

In *Regina v. Rearden*, 4 F. & F. 76, the prisoner was indicted at the Kent Summer Assizes in 1864, for feloniously abusing and carnally knowing a female child under the age of ten years. The mother of the child was an ignorant woman at whose house the prisoner, a labourer, lodged. She was necessarily out at her work all day from as early an hour as six in the morning and until night, with the exception of the dinner hour at midday. The first occasion spoken to by the child was on a Thursday morning while she was in bed just after her mother had left. The child stated that he threatened to beat her if

she told. Counsel for the crown was going on to ask as to subsequent perpetrations of the offence on the Saturday and again on the Monday, when counsel for the prisoner objected to such evidence being admitted, as it would be the subject of a different indictment.

Willes, J.: "The evidence is admissible. Virtually, it is all part of one and the same transaction.

In a case before me on the Western Circuit, a case of larceny of grain from a barn in which the owner had watched and detected several stealings by the same person, I admitted evidence of all of them." Counsel for prisoner: "The case of larceny is different, and is provided for by statute." Willes, J.: "But the statute was not necessary when the whole was one continuous transaction." * * * Willes, J., speaking of several counts for different felonies in the same indictment, said: "The practice is, no doubt, in the discretion of the Court, to call on the prosecution to elect, but that is a course never taken where the acts are all in substance part of the same transaction; and here, in my opinion, it is so. It has repeatedly appeared to me, in cases of this sort, that the man by a threat of violence deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions; and this seems to me to give a continuity to the transaction which makes such evidence properly admissible."

As to evidence of subsequent conduct in robbery, see *Egerton's case*, R. & R. 375, and per Holroyd, J., in *Rex v. Ellis*, 6 B. & C. 145. As to evidence of previous or subsequent conduct in burglary, see *Regina v. Cobden*, 3 F. & F. 833; *Regina v. Whiley*, 2 Leach 983. As to evidence of previous conduct in arson, see *Regina v. Dossett*, 2 C. & K. 306; *Regina v. Harris*, 4 F. & F. 342; *Rex v. Long*, 6 C. & P. 179. As to the continuity of the transaction in larceny, see *Regina v. Bleasdale*, 2 C. & K. 765; *Regina v. Firth*, 11 Cox C. C. 234; *Regina v. Henwood*, 11 Cox C. C. 526; *Rex v. Ellis*, 6 B. & C. 145. As to other conduct in forgery, see *Roupell et al. v. Haws*, 3 F. & F. 784.

In *Rex v. Nichol*, R. & R. 130, evidence such as was rejected by Patteson, J., in *Rex v. Lloyd*, seems to have been given without objection, and it seems to me that the ruling of Patteson, J., in that case, would not now be upheld.

In *Wills on Circumstantial Evidence*, at page 47, it is said "that all such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes, even though they may severally constitute distinct felonies, are clearly admissible in evidence."

In the present case, I think the evidence was properly admissible as evidence in chief, as tending to establish the indecent quality of the assault, and as being in effect a part or continuation of the same transaction with which the prisoner was charged.

I think, therefore, the conviction should be affirmed.

HAGARTY, C. J., concurred.

CAMERON, J.—On the case as presented by the case reserved, I think it was competent to the counsel for the Crown on re-examination to have displaced any impression that the cross-examination might have left on the minds of the jury from the conduct of the defendant towards the prosecutrix, and that the evidence objected to was therefore admissible under the circumstances; but I do not wish to be considered as holding that the Crown might have given such evidence as part of the case for the prosecution quite irrespective of the course pursued by the defendant's counsel in cross-examining the prosecutrix.

Conviction affirmed.

HAYWOOD ET AL. V. HAY ET AL.

Obstructing sheriff—Conviction under 32-33 Vict. ch. 32—Attachment.

The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendant who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a Police Magistrate and fined, under 32-33 Vict. ch. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs.

January 10, 1882. *Robertson, Q.C.*, obtained an order *nisi* calling upon James Hay, the younger, John Hay, and James Bain, three of the defendants, and J. W. Jopp, and Thomas Johnston, to shew cause why an attachment should not issue against them for contempt in obstructing the sheriff of the county of Oxford in the execution of his duty under the writ of replevin in this cause, and with force and violence rescuing from his custody certain goods seized by him for replevying them to the plaintiffs, on grounds set forth in affidavits and papers filed.

The rule was granted on affidavits, from which it appeared that certain parties in the United States claimed some patent machines from the defendants at Woodstock, and obtained a writ of replevin, which they took to the sheriff. He sent his under sheriff (as he was called) and a bailiff, one Magee, to whom he gave a warrant, to the defendants' factory, accompanied by the plaintiffs' agent and their solicitor. The writ was shewn, but the parties named in the rule, with others of the factory people, refused to allow it to be executed, and, it was sworn, rescued the articles seized from the sheriff's officers.

A good deal of litigation had taken place between the parties. An equity suit had been brought, and the property said to have been rescued had been placed *in custodiâ legis*.

It appeared from an affidavit of the sheriff, called for by the Court, that John Perry was not his deputy, but that he gave him a warrant on this occasion.

Neither this warrant nor the warrant said to have been given to Magee was produced or proved on this application.

It also appeared that John Perry and Magee (the sheriff's bailiff), on 20th December, 1881, laid information before the police magistrate at Woodstock, each charging that these five persons did unlawfully assault them, each acting as bailiff of the sheriff of Oxford, and then being and acting in the execution of their duty as sheriff's officer and bailiff, and did beat, wound, and ill-treat them. Perry's information was against all these, Magee's only against Johnston, Bain and Budd.

The police magistrate certified under his seal that such informations were laid against these parties and one William Budd for assaulting Perry and Magee in the execution of their duty; "and the accused parties consenting to my deciding upon the charges summarily, the said informations having been laid under sec. 5, ch. 32, of the statutes of the Dominion of Canada," he adjudged James Hay, the younger, to pay a fine of \$10 and costs; John Hay, \$10 and costs; William Budd, \$10 and costs; James Bain, \$5 and costs; Thomas Johnston, \$5 and costs.

It appeared that Jopp was discharged by the police magistrate.

February 14, 1882. *Bethune, Q. C.*, and *Aylesworth* shewed cause, filing affidavits in reply, and taking many objections to the proceedings, which, in the view taken by the Court, it is not necessary to set out.

Robertson, Q. C., contra.

March 8, 1882. HAGARTY, C. J.—The non-production of proof of the warrant to Perry, and of that said to have been given to Magee, would probably have been fatal to the application.

The proceedings before the police magistrate at Woodstock were no doubt taken under sub-sec. 5 of sec. 2, 32-33 Vic. ch. 32. Sub-sec. 5 provides for a person being charged "with having assaulted, obstructed, molested, or hindered any magistrate, bailiff, or constable, or officer of

customs or excise, or other officer in the lawful performance of his duty, or with intent to prevent the performance thereof."

Section 3 allows parties charged to elect to be tried summarily, which they did in this case.

Section 17 allows the magistrate, on conviction, to award up to six months' imprisonment, with hard labour, or a fine up to \$100, or both fine and imprisonment.

Section 29: "Every person who obtains a certificate of dismissal, or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause."

This Court has undoubted power to punish any persons presuming to interfere with the execution of its process, and the exercise of such power is necessary whenever a clear case of contempt is shewn.

In the case before us, the sheriff's officers, who claim that they have been interrupted in the performance of their duty, have thought proper to seek for the punishment of the offenders before another tribunal, viz., the Police Magistrate. The defendants, when brought there, submitted themselves to the jurisdiction, and thereby made themselves liable to a most severe punishment, viz., six months' imprisonment at hard labour, or a fine of \$100, or both.

This is at least as severe a punishment as any this Court would have properly inflicted.

The Act under which the defendants were convicted, evidently contemplates that no further punishment in the nature of a criminal proceeding shall take place.

I have a very strong opinion that after subjecting the defendants to the very chances of sentences so severe as that statute permits, and under which they have been convicted, this Court ought to refuse its interference.

One of the defendants, Jopp, was included in the charge before the Police Magistrate, and appears to have been discharged.

We discharge the rule for attachments; but to mark

our disapproval of the course taken by these parties in resisting the execution of legal process, we refuse to give them costs.

ARMOUR and CAMERON, JJ., concurred.

Judgment accordingly.

REGINA V. CLUFF.

Certiorari—Allowance of—Quashing same.

Where the recognizance to prosecute a *certiorari*, returned after allowance of the latter by the convicting justices, together with the conviction, is substantially and clearly bad, and the conviction may possibly be upheld, the allowance of the *certiorari* may be quashed on the return of the rule *nisi* to quash the conviction, without a substantive motion for that purpose ; but otherwise, where the objection is a trival one, or the conviction is clearly defective and must inevitably be quashed.

On the return of the rule *nisi* in this case, to quash the conviction, *Aylesworth*, for the private prosecutor, took the preliminary objection to the allowance of the writ of *certiorari*, upon which the conviction had been returned, that no recognizance, or no valid recognizance, had been entered into, as required by the statute, 5 Geo. II. ch. 19, sec. 2, by the party prosecuting the *certiorari*, before one or more Justices of the Peace of the county or place where such judgment or order had been made, &c., conditioned to prosecute the same at his own costs and charges with effect and without wilful or affected delay, and to pay the party in whose favor such judgment was given, &c., his full taxed costs.

The recognizance returned with the *certiorari* was taken before two Justices of the Peace for the county of Carleton, and the conviction had been made by Justices for the county of Stormont. It was conditioned to prosecute the motion for the writ of *certiorari* with effect, &c., and it had in fact been entered into before the motion was made.

Watson, for the defendant, contended that the objection came too late and should have been made by a substantive motion to quash the allowance of the writ. He further contended that the recognizance had been allowed, in effect, by the order granting the writ of *certiorari*, which was drawn up on reading the notice of the application and the recognizance.

Aylesworth, contra.

February 28, 1882. OSLER, J.—The Statute 5 Geo. II. ch. 19, sec. 2, recites that divers writs of *certiorari* have been procured to remove judgments or orders (of Justices of the Peace) into his Majesty's Court of King's Bench at Westminster, in hope thereby to discourage and weary out the parties concerned therein by great delay or expense; and enacts that no *certiorari* shall be allowed to remove any such judgment or order, unless the party prosecuting such *certiorari* before the allowance thereof shall enter into a recognizance with two sufficient sureties, before one or more Justices of the Peace of the county or place, or before the Justices in their Quarter Sessions, where such judgment or order shall have been made, or before any Judge of the King's Bench, in the sum of £50, with condition to prosecute the same at his own costs and charges with effect, and without wilful or affected delay, and to pay the party in whose favour such judgment was given, within one month after such judgment or order shall be affirmed, his full taxed costs.

In *Paley on Convictions*, ed —, p. 421, it is said that the statute seems at one time not to have been understood to apply to convictions, as it mentions only judgments and orders; but that ever since Michaelmas Term 26 Geo. III., the practice has uniformly been to require a recognizance for the allowance of a *certiorari* in all cases of the removal of summary convictions.

A form of recognizance is given at pp. 547-8, and in the directions at the foot it is said:

"A blank recognizance is usually transmitted from the Crown Office along with the *certiorari*."

The recognizance is for the protection of the party ; the notice of the application required by another statute, 13 Geo. II, ch. 18, sec. 5, for that of the justices.

The latter Act provides that the *certiorari* shall not be granted, issued forth, or allowed, unless due notice in writing is proved to have been given to the justices making the conviction ; while the other enacts that it shall not be *allowed* until the recognizance shall have been duly entered into.

The writ is granted by the Judge or Court to whom the application for it is made ; the allowance is by the person to whom it is directed : *Rex v. Abergale*, 5 A. & E. 795.

The Justice ought not, and cannot be compelled, to allow the writ, or make any return to or act upon it until the recognizance required by the statute has been entered into and delivered to him, so that he may return it with the writ to the Crown Office.

Until the prosecutor has been served with a rule *nisi* to quash the conviction after the return of the *certiorari* he has no notice (necessarily) of the issue of the writ or of the recognizance or the return.

Where, as in this case, the objection to the allowance of the *certiorari* is a substantial one, and the conviction not manifestly bad, I can see no reason why the party should be precluded from raising it on the return of the rule to quash the conviction, instead of being driven to incur the expense of a special motion to quash the allowance. Where, on the other hand, the objection is of a trivial or merely technical character, as in the case of *Regina v. Hoggard*, 30 U. C. R. 152, the party might well be told that he would not be heard to raise it except in a strictly formal and technical way ; and, *a fortiori*, if the conviction was clearly defective and must inevitably be quashed, for in that case the recognizance would be of no avail to him.

Here the recognizance upon which the Justices have allowed the *certiorari* is worthless, and the conviction may possibly be upheld.

I think, therefore, I must give effect to the objection and

quash the allowance of the *certiorari*. The rule will be to quash the allowance of the *certiorari*, and that the return to the writ be enlarged, and the said writ and the conviction, and the papers returned therewith, be sent back to the Justices, in order that the writ may be duly allowed after the defendant shall have entered into a recognizance with sufficient sureties, as required by the statute in that behalf.

The result is, that the present rule *nisi*, drawn up on reading the *certiorari* and return thereto, and the papers returned therewith, must be discharged, with costs.

I refer to *Regina v. McAllan*, 45 U. C. R. 402; *Regina v. Johnson*, 30 U. C. R. 423; *Regina v. Dunn*, 1 T. R. 217; *Rex v. Abergele*, 5 A. & E. 795; *Regina v. Jones*, 9 Dowl. P. C. 504.

Rule accordingly.

IN RE LANGMAN AND MARTIN ET AL.

Arbitration—Submission.

By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost.

Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s work, that E. was not an arbitrator; and that the agreement could not be made a rule of Court as a submission to arbitration.

February 28, 1882. *Aylesworth* moved on notice to make a submission to arbitration a rule of Court, citing, besides the cases referred to in the judgment, *Stevenson v. Watson*, L. R. 4 C. P. D. 148.

Clute, contra, objected that the instrument (which is set out in the judgment), was not a submission to arbitration within the statute.

March 3, 1882. OSLER, J.—The question is, whether the instrument sought to be made a rule of Court is a submission to arbitration within the Act.

It was made between Richard Langman, builder, and several persons named, being the committee for the building of the Methodist Episcopal Church, in the village of Stirling; and was stated in the "preamble" to be "a final settlement between the parties of all and every lawful claim existing to date of this surrender of an original or of all previous contracts between the parties."

The clauses necessary to be referred to are: Article 1—"That Mr. Arthur Elliott shall inspect, and, if approved by him on the part of the committee, accept the work in its present state, as work done in accordance with the plans and specifications. Article 2. If it be found by the said architect that any work has not been done according to

the plans and specifications, that is to say, the work on roof material, or recent brickwork, it shall be rectified and made right at the expense of Langman, and shall be deducted from the amount of the award as due to Langman, as hereinafter specified. Article 3. Mr. Elliott, by the mutual agreement of the contracting parties, or a competent man, shall be chosen as a valuator of the church building in its present condition, and shall be required to make such valuation under oath lawfully administered. Article 4. The award by the said valuator to be final, and to be the aggregate and sole amount due to Langman to date. Article 5. If any disputed claim against the church exist, and litigation ensue, and expenses be thereby involved, said expenses shall be met in accordance with the decision of the Court in the case. Article 6. Whatever balance may be determined as the lawful due of Langman shall be paid him in full not less than one month from the date of the final settlement of all accounts or claims against the building. Article 7. All lumber or other material purchased and on the ground that can be used on the church to be inspected by the architect, and to be paid for at the original cost. Article 8. The parties in contract bind themselves to abide by the decision of the said valuator, to obey the terms and conditions of the agreement. Article 9. All previously made contracts to be null and void, and this contract to be of full force and virtue from the date hereof. Article 10. The aforesaid committee shall have immediate and sole control of said building materials, and all appertaining thereto, so that work may at once proceed, and shall have immediate and lawful ownership of said material, according to the inspection and valuation made as aforesaid by Mr. Elliott. Article 11. The said Mr. Langman shall so surrender all interest and claim in said building and material, according to the said inspection and valuation, from the date of this agreement."

The effect of the preamble and of the 9th clause of this agreement, is that all previous contracts and agreements between the parties are terminated and surrendered.

Elliott, an architect, is to inspect, and, if approved by him on the part of the committee, to accept the work in its present state, as work done in accordance with the plans and specifications; but if it be found by him, that is, upon his inspection, that any of the work has not been done in accordance with the plans, it is to be rectified and made right at Langman's expense, that is, by deducting the expense from whatever sum may be found due to him.

Elliott is to value the building in its present condition.

He is to inspect the lumber and other material on the ground, which is to be paid for at the original cost.

Clauses 10 and 11 shew that he is to value such material as well as to inspect it.

Are his duties those of an arbitrator?

It appears to me that they are not.

The parties have put an end to all disputes and claims arising under any former contracts between them. Work has been done for the building committee by Langman; but he agrees to forego all right to compensation, except under this new contract, the inspection, acceptance and valuation by Elliott. It is as if the original contract had contained the common stipulation that no liability upon the part of the employer should arise, except upon the certificate of the architect.

In *Scott v. The Corporation of Liverpool*, 3 DeG. & J. 334, 368, Lord Chelmsford said: "Where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration, as no disputes can exist in such case, everything being dependent upon the decision of the individual named; and till he has spoken, no rights can exist which can be enforced at law or in equity."

In *Collins v. Collins*, 26 Beav. 306, the Master of the Rolls says: "An arbitration is a reference to the decision of two or more persons, either with or without an umpire, of a particular matter in difference between the parties; and although it is very true that in one sense it must be im-

plied, either that there is a difference, or that a difference may arise, between the parties, yet the distinction is material, and one which has been properly relied on. * *

“ If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say we will refer the question of price to A. B., he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be ‘arbitration’ in the proper sense of the term within the meaning of the Act; but if they agree to a price to be fixed by another, that does not appear to be arbitration.”

What the parties have done here is, in my opinion, to abandon their differences, to agree that no contract exists between them upon which any action can be brought, and that a price to be fixed by another shall be paid for the work.

I think, therefore, that this is not a submission to arbitration, and the the motion must be refused with costs. See *Tharsis, &c., Co. v. Loftus*, L. R. 8 C. P. 1; *Turner v. Goulden*, L. R. 9 C. P. 57; *Bos v. Helsham*, L. R. 2 Ex. 72; *Re Hopper & Wrightson*, L. R. 2 Q. B. 367-452; *Wadsworth v. Smith*, L. R. 6 Q. B. 332.

Judgment accordingly.

SHEPHERDSON V. McCULLOUGH.

Survey—Conventional line—Statute of limitations.

The plaintiff owned the east three-quarters and the defendant the west quarter of lot 25, in the 11th concession of Euphrasia. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands. The parties cleared up to the line run by L. on each side of it, and a fence was gradually built along the line as the clearing proceeded, but did not extend through the lot, and had not all existed for more than ten years. The plaintiff had notified defendant that, if any of his timber fell into the plaintiff's clearing, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links farther west than L.'s line. On this line the plaintiff erected a fence which the defendant took down, and the plaintiff brought trespass.

Held, ARMOUR, J., dissenting, that there was ample evidence of the defendant's possession of the land bounded by the line run by L., so as to entitle him to claim according to that line produced from front to rear of the lot, and a verdict in his favour was upheld.

Per ARMOUR, J., adjoining proprietors cannot be bound by a line run between them, which is not the true line, except by such a contract as the Court of Equity would decree specific performance of. Here there was no evidence of any contract or intention to abide by L.'s line, whether it was a true line or not; and in such a case the statute will give a title only to such land as has been substantially enclosed for the whole of the statutory period.

Per HAGARTY, C. J., apart from the statute, the evidence did not shew with sufficient clearness, as a matter of survey, that defendant had trespassed on his land.

Action for trespass to the east three-quarters of lot number 25, in the 11th concession of the township of Euphrasia, tried before Morrison, J. A., on 30th April, 1881, at Owen Sound.

The defendant pleaded not guilty: that the land was not the plaintiff's; and an equitable plea—that Nathaniel Curry, being the owner in fee of said lot 25, on or about the 6th day of April, A. D. 1858, granted by deed to the defendant the westerly quarter of the lot, containing fifty acres, more or less: that at the time of the said grant the said Curry measured off and pointed out to the defendant fifty acres as being and represented the same to be the said westerly quarter, and the defendant thereupon entered into possession of the said land so measured and pointed out to him by the said Curry: that afterwards the said

Curry conveyed the remaining three-quarters of the said lot to the plaintiff, who took the same with notice of the above facts: that over fifteen years before the commencement of the suit the plaintiff, being desirous of having the boundary between his three-quarters and the defendant's part of the lot accurately determined, procured with the consent of the defendant, who contributed to and paid half the expense thereof, a provincial land surveyor to lay off the dividing line between the plaintiff's and the defendant's said respective portions: that the surveyor did determine and lay off the boundary, and the said boundary so determined gave the defendant about two rods frontage more land than was contained in the plot of ground pointed out by the said Curry: that thereupon the plaintiff and defendant accepted the line so determined as the correct boundary of their respective portions of the lot, and acted thereon by making fences along said line and otherwise until this suit was brought: that upon the faith of the said line being the correct boundary, defendant made lasting improvements up to the line so determined: that the trespass complained of was committed on the portion of land defined by the surveyor as defendant's; and that under the circumstances the plaintiff was barred in equity from questioning the correctness of the line so run and accepted; and that if the plaintiff was not so bound by the said line the defendant was entitled to a lien upon the land in question to the extent to which the land had been enhanced by the improvements. And the defendant prayed that the said line should be declared by the Court to be binding upon the plaintiff, and the plaintiff enjoined by the order and injunction of the Court from interfering with the defendant in his enjoyment of the land determined by the said boundary; or that, in case he was not entitled to this, that he might be declared to have a lien upon the land for his improvements.

The plaintiff replied, taking issue, and by way of replication, on equitable grounds, that during all the dealings with the several parcels of lands in the defendant's

plea mentioned, it was understood by the said Curry, the plaintiff and the defendant, that the boundary between the 11th and 12th concessions of the said township was unascertained and unsettled, and that said supposed boundaries were liable to be changed when the boundary between the said concessions was finally ascertained, and that the use and occupation by the defendant of the land was more than sufficient to compensate him for the said improvements.

The defendant took issue upon this replication.

From the evidence it appeared the township of Euphrasia was surveyed by Charles Rankin, a deputy provincial land surveyor, in the year 1836, under instructions from the surveyor-generals' department, dated 23rd April, 1836. By these instructions he was to survey the township on the same principle as he had surveyed the township of Nottawasga, and the letter conveying the instructions to him contained the following passage: "From your having been so frequently employed in government surveys, and your knowledge of all that is required, it is unnecessary to enter into lengthy instructions, and, therefore, have merely to request you to be as expeditious and economical as possible." By this survey the township was laid out into concessions, there being a road allowance in front of every other concession, and a side road every sixth lot: that on these side roads a stake was planted on the line called a blind line, to denote the point where the concessions abutted, but stakes were not placed at the angles of the lots along such line. By the scheme of survey each concession was intended to have a depth of 67 chains 30 links. The plaintiff had the paper title to the east three quarters of lot twenty-five in the eleventh concession, and the defendant to the west quarter. The defendant and plaintiff both claimed under Nathaniel Curry, the grantee of the Crown. The deed from Curry to the defendant was prior in point of time to the deed to the plaintiff.

From Rankin's field notes it appeared that he had planted a post on the side road, 67 chains 30 links, from the

commencement of the 11th concession, and here the 12th concession began, and at the distance of 67 chains 30 links another post was planted to denote the end of the 12th concession; but in fact on the ground this latter post was 73 chains and 73 links from the former, and made the depth of the 11th concession 67 chains 45 links. Charles Rankin, who was called as a witness for the plaintiff, swore that he made the original survey: that he planted stakes on the side roads to denote the point where the concession abutted: that the design was to make the concessions equal: that when he found his stakes as planted would not do this, he sent men to place them so as to make them equal: that in the present case they might have omitted to make the correction. He did not think he was required by his instructions to place stakes on the blind line, but he in fact did so.

Nathaniel Curry, called by the plaintiff, said, in reference to this stake on the blind line between the 11th and 12th concession, "I saw it there, a small sized stake; there was on it R., for road; there were no numbers on it. I saw it, I think, about twenty-five years ago. It is what we supposed to be Rankin's stake in the centre of the road." It also appeared that the plaintiff and defendant got Mr. Lynn, a surveyor, about sixteen years before the trial, to divide the plaintiff's three quarters from the defendant's quarter of the lot; and in making this division the post planted by Rankin was taken as the starting point; and if this was to govern, the defendant would be entitled to succeed on the strength of his paper title. After this survey the plaintiff cleared up to this line and notified the defendant if the trees on his, defendant's side of the line, fell into the plaintiff's clearing, the defendant would have to remove them. The defendant also afterwards cleared along this line to the distance of twenty-five chains fifty-five links, for ten chains, as much as fourteen years before suit, and for eighteen chains forty links, twelve years; for the remaining part of the distance it would not seem to have been cleared for ten years, but it was always claimed by the defendant.

In 1878, the plaintiff got one Garden, a surveyor, to run the line between him and the defendant. By this survey the western boundary of the lot was carried further to the west by two chains and seventy-nine links, and the western boundary of the plaintiff's land two chains and ten links, bringing him to the latter distance on the land claimed by the defendant under Lynn's surveys. In the spring of 1880 the plaintiff put up a fence on the Garden line, which the defendant tore down, and in consequence of this this action was brought.

The learned Judge reserved the case, after the evidence had been given and the address of counsel, for further consideration, and on the 28th June, 1881, entered a verdict for the the defendant. His judgment was as follows :

"I am of opinion the defendant is entitled to succeed. I find in his favour on all the issues. I find that Lynn's survey was made from an original post planted by Rankin in the original survey : that Lynn's survey was made about sixteen years ago ; and that it was acquiesced in by both plaintiff and defendant : that they mutually erected their fences, &c., according to it, and that the defendant has always been in possession according to that line. I therefore enter a verdict for the defendant."

On the 24th November, 1881, *Masson*, on behalf of the plaintiff, obtained a rule *nisi* calling on the defendant to show cause why the verdict and findings of the learned Judge before whom the action was tried should not be set aside, and judgment entered for the plaintiff, or a new trial directed, on the grounds that the said verdict and finding were contrary to law and evidence, and the weight of evidence.

On the 8th day of December, 1881, *Creasor*, Q. C., shewed cause. The defence is based on three grounds. 1. That in the original survey of the township of Euphrasia stakes were planted to mark the centre of the concessions. The evidence clearly established the position of the stake marking the centre of the concession in question ; and

according to that stake the defendant's fence, between his land and that of the plaintiff, was on the true boundary. The field notes shew that the surveyor of the township planted this stake at the original survey. His practice was to plant a stake at the centre of the concessions, and when he ran out to the end of the concession, if he found an overplus or shortage, he caused the stake to be put at the true centre. In this case the stake is not at the true centre, but the contention of the defendant is that, as the work on the ground must govern, the stake in question must be taken as establishing the true centre of the concession. See R. S. O. ch. 146, secs. 46, *et seq.*; *Ovens v. Davidson*, 10 C. P. 302; *Carrick v. Johnson*, 26 U. C. R. 69; *McGregor v. Calcut*, 18 C. P. 39; *Artley v. Curry*, 1 C. L. T. 661. In this case Spragge, C., held that the stake in question was a governing stake to mark the centre of the concession.

2. The plaintiff and defendant, over fifteen years before action, had the division line run between their respective parcels of land, and the parties acted on this being the true line by building fences thereon, each party clearing to the line, and plaintiff requiring defendant to remove trees on the line, which the defendant did. This line is the same as the stake indicates, and defendant submits that this line, even if not the true line, is, as a conventional line agreed upon and acted on by plaintiff and defendant, binding on them. See *Bernard v. Gibson*, 21 Grant 195; *Wideman v. Bruel*, 7 C. P. at p. 134; *Doe Becket v. Nightingale*, 5 U. C. R. at p. 520; *Doe Bonter v. Savage*, 4 U. C. R. 223; *Bell v. Howard*, 6 C. P. at p. 296; *Martin v. Weld*, 19 U. C. R. at p. 633; *Bishop on Contracts*, sec. 130, and cases there cited.

3. Defendant claims by length of possession. He has had possession of, and fenced most of the land in dispute for over ten years. A small piece in the rear he has not had possession of for that time, but he submits he is entitled under the circumstances of this case to as well the part he has had ten years' possession of as its continuation to the rear of the lot. A mere trespasser has only pedal posses-

sion, but when a party is in possession of a part under a claim of right to the whole, he is deemed to be in possession of the whole. In this case the defendant was in possession for over ten years of a part as defined by the line surveyed and agreed on between him and plaintiff, and must therefore be deemed in possession of all defined by that line: *Weld v. Scott*, 1 U. C. R. 537; *Elliott v. Bulmer*, 27 C. P. 217; *Bernard v. Gibson*, 2 Grant 195, judgment of V. C. Strong. See also *Hyland v. Scott*, 19 C. P. 165; *Davis v. Henderson*, 29 U. C. R. 344; *Mulholland v. Conklin*, 22 C. P. 372.

J. Masson, contra, contended that the stake in question was not binding, and that the concession should be equally divided, which would give plaintiff a portion of the land now occupied by defendant: that even if the stake were binding then that a line should be run from it diagonally to the centre of the concession in the rear, instead of parallel to the governing line of the concession: that the conventional line claimed by the defendant was never in fact accepted by the parties, and that it was the intention of both, at some future time, to have the line re-run: that the possession of the defendant was not adverse, and even if so, he was only entitled to the part he had actually in possession for ten years; and that therefore the plaintiff was entitled to recover for the part which defendant had not for ten years. He referred to and commented on several of the cases cited by defendant's counsel.

March 8, 1882. HAGARTY, C. J.—Apart from the defence under the Statute of Limitations, the plaintiff had to establish as a matter of survey that defendant had trespassed on land belonging to him. I do not think he has proved this with sufficient clearness.

His evidence shews that Rankin, in the original survey in 1836, did in fact plant a stake on the blind line, intending thereby to indicate the depth of the concession, surveying two concessions without a road allowance between them. It is said he was not instructed so to do. But we

find that the Crown Lands Department entertain "no doubt that under the system then in vogue he did plant a post on the blind line on the side road run by him in accordance with the diagram of projections furnished to deputy surveyors at that time, along with their instructions."(*a*).

This post was treated as an original monument for a long series of years. Plaintiff and defendant held from the same person, and the land was divided between them in accordance with this point as the true boundary.

I do not see that the fact of Rankin intending to send one of his men to alter this post if he discovered it to be wrong (as he says may have been the case), and not in fact doing so, can affect its present force as work on the ground in the original survey.

Draper, C. J., says, in *Ovens v. Davidson*, 10 C. P. 310: "It is by the work as executed on the ground, not as projected before execution, or represented on the plan afterwards, that the actual boundaries are determined." See also *Carrick v. Johnston*, 26 U. C. 74.

The law as to surveying two concessions in one block is not so clearly laid down in the statutes as it is respecting the angles of lots, but I cannot see on what principle a post planted in the original survey intended to indicate the centre of the block and depth of each concession, and acquiesced in for thirty or forty years, ought not to govern.

Mr. *Masson*, for the plaintiff, argued that even if Rankin's post should govern; the line should be drawn from it northward, and would by a diagonal course entitle the plaintiff to a part of the land in dispute.

The evidence, however, I think, wholly fails to shew what would be the true course northward of such a line, and as to the small portion of the land claimed which is not by actual fences for over ten years in defendant's possession, the piece that would be affected by any line drawn from Rankin's post would be very trifling in extent and certainly not determinable on this evidence.

(*a*) This appeared by a letter from the Department.

Then we find these parties agreeing to have the line run, or rather marked out, to shew the boundary between them. This is done by Lynn, who adopts Rankin's post. This is sixteen or seventeen years ago, and until lately they govern themselves by this line so indicated, build their fences by joint action, and defendant has occupied by actual fenced enclosure for more than the statutable period all except a small portion of the land claimed.

I do not understand this case at all to resemble those in which it has been properly held that where possession under the statute has been gained up to a line of fence between a portion of two properties, that a party has a right to require the line to be projected in the same course over previously unoccupied portions. Here I understand there was a line mutually established, marked and visible as the agreed on boundary. Then if the evidence establish that the parties by their acts for the requisite length of time clearly treat such line as their dividing boundary, I do not see why it may not be left properly to a jury to say if there have not been the possession of one and the exclusion of the other for the necessary time.

I consider the ordinary rules properly laid down in the case of mere intruders or trespassers on other men's lands as inapplicable to a case like that before us, where there is no intention, on the one hand, of intruding or trespassing, or of any neglect or omission, on the other, to resist encroachment or submit to trespass.

I am satisfied that if a jury had found a sufficient possession in defendant the Court would not disturb their verdict.

The learned Judge has here found the possession in defendant's favour, as he has also found the question of survey.

I do not feel warranted in interfering with his conclusion of fact.

I do not wish that any words of mine applicable to a case of this character should be understood as pointing to any relaxing of the wholesome rules that govern the

evidence adduced to establish a constructive possession in favour of trespassers.

While I refuse to hold, as a settled point of law, that a fence is the only sufficient evidence of possession to oust the true owner, I fully adopt the view that evidence sufficient for such purpose must be clear and unequivocal.

In a case of boundary like that before us, the doctrine of discontinuance of possession by the true owner against his neighbour may well be resorted to in aid of evidence of occupation by the latter.

ARMOUR, J.—Questions of some nicety with respect to the survey arise in this case. There may be, and perhaps is sufficient evidence before us to enable us to determine them, and it may be that they ought to be determined in the plaintiff's favour; but before determining them I desire some further information, which I think we ought to call for, or grant a new trial for the purpose of obtaining.

Assuming, however, that the land in dispute is covered by the plaintiff's deed, I do not think that anything has occurred to extinguish the plaintiff's title to any part of it except that part which has been enclosed by the defendant for more than ten years, and in determining this I have to determine the following questions: 1st. Was the line run by Lynn conclusively binding upon the parties? 2nd. What effect, if any, had the running of Lynn's line upon the rights of the parties? 3rd. What kind of possession must an adjoining land owner have of his neighbour's land upon which he has encroached to extinguish the title of his neighbour to it? and 4th. Had the defendant any such possession?

In *Dennison v. Chew*, 5 O. S. 161, (T. T. 6 Wm. IV.)—trespass—the plaintiff and defendant were owners of adjacent tracts of land. Upon running the division or side line between them agreeably to the method prescribed by the Provincial Statute 59 Geo. III. ch. 14, it was lately ascertained that the plaintiff was in possession of a part of the lot covered by the defendant's title. The defendant in

consequence took upon himself to remove the division fence between them, in order to make it conform to the correct line newly run, and for this removal and entry on the land this action was brought. The plaintiff relied upon his long possession, and proved that he and those under whom he claimed had been in undisturbed possession of the piece of land in question for more than twenty years, and that about the year 1807 the former proprietors of these adjacent lots had a line run by a licensed surveyor for the purpose of ascertaining the boundary between them: that they had placed the division fence according to this survey, and that their respective occupations had conformed to it since.

Robinson, C. J., says: "But it is said that * * at a period now more than twenty years ago this plaintiff and the owner of lot 5 had the line run, and that possession has always since been held by each conformably to that line. The evidence, viewing it in its strongest light, only shews that the parties at that time wished to ascertain the true boundary between them, and meant to conform to it, but they were in a common error; there was no adverse holding intended—no defiance by one of the other's right—no determination avowed or shewn to hold to the line that had been run, whether it were the right line or not. * * *

If it had been shewn that twenty years ago the proprietors of these adjacent lots had, by the help of a surveyor or without, agreed upon a division line, and expressed a determination that it should stand whether it should be discovered to be erroneous or not, then it might follow that after twenty years possession in conformity to this boundary, a conveyance might be presumed, and the parties might not be permitted to dispute the boundary; or, as I mentioned before, if one party had taken possession up to the line when run many years ago, insisting upon it as his right, and in a hostile spirit shewing a determination to maintain his position, be the right what it might, then the Statute of Limitations might be called in to confirm the adverse possession so long maintained. * * But

here the one party only claimed what he possessed, as believing it to be number four; and the other supposing it to be part of number four, and pretending no claim to that lot, acquiesced on that ground only in his possession. The one party had no idea of dispossessing, nor the other any apprehension of being dispossessed. Here was no waiver of a remedy, for the wrong was not known or intended. The fair construction, I think, to put upon the act of these parties in running the line is, that they wished to ascertain the limits of their respective properties, and imagined they had done so; neither of them, however, wishing or intending to hold except in the faith that the survey was correct."

In *Doe Hill v. Gander*, 1 U. C. R. 3 (E. T. 7 Vic.), ejectment for lot 2, 7th concession of Pelham, it was proved that the proprietor of lot 1 had for more than twenty years possessed according to a fence which was not straight, and which he had placed as a division line between lots 1 and 2, but which ran only part of the way back upon the lot. The fence was an encroachment on lot 2, and the back part of the lot not included in it was still woodland and not in the actual occupation of either party. The plaintiff's counsel at the trial contended that B.'s adverse possession could not be extended to the rear part of the lot, or to any part of it, which the fence did not actually include, while for the defendant it was urged that the adverse possession included all such parts of the lot as the fence if protracted would include.

Robinson, C. J., says: "We think the plaintiff is entitled to recover for the woodland. It would not be reasonable to carry into effect the Statute of Limitations in the spirit which is contended for by the defendant. When the owners of these adjoining lots took possession of their respective lands, there is no doubt that neither of them meant to do wrong to the other by occupying any land not covered by his own deed. They took possession, believing that they had placed their boundary fence on the true line. If meaning to be correct they fell into an error, and that error was

unfortunately not discovered for more than twenty years, it will be sufficiently hard that by the effect of the Statute of Limitations the rightful owner should lose such part of his land as he has ignorantly suffered the other to occupy for so long a period ; but the hardship would be much greater if he must also lose so much as would be included within a line protracted from the boundary fence through the unoccupied land. As to the legal principle, the point is not a new one. We had it expressly before us in *Chesley v. McDonald*, and I think incidentally in other cases, and we have decided that the party having the title loses only that of which he has actually been dispossessed."

In *Doe Beckett v. Nightingale*, 5 U. C. R. 518, (T. T. 12 Vic.) ejectment, the lessor of the plaintiff was the owner of lot 7 on the west side of Yonge street, and the defendant was the tenant of one Ketchum of lot 8 adjoining it, and the fence hereinafter referred to was placed on the line of a survey made between the said lots by a surveyor by a compass, who said he informed the party who employed him that the survey so made by him could not be depended upon.

Robinson, C. J., says: "There was a point made in the argument of this case on which it is proper that an opinion should be expressed. I mean the claim advanced by the defendant to have it considered that the lessor of the plaintiff, and those under whom he makes title, have been actually dispossessed of all this land in dispute for the whole time that the defendant or Ketchum has kept up the fence which extends only through a part of it, on the principle that the laying down the fence as far as was done from the front, should be considered as excluding the proprietor of the adjoining lot from whatever land the fence, if protracted to the rear, would cut off from him, though for a great part of the time there was a portion of the rear part of the lot through which the fence was not continued, and from the possession of which the latter was not excluded. I do not consent to this doctrine of gaining a right by establishing a wrong, through nothing but a

constructive and imaginary possession, and have frequently, in other cases, declared that I do not. When the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line of division, and lay their fences accordingly, but carry them out only part of the way, then it may, perhaps, be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to if the same were protracted; but the present is not such a case, and the general principle I take to be, that what a man suffers himself to be actually dispossessed of and excluded from for twenty years he has lost, but that he is not to be barred of his right by the Statute of Limitations in land of which he is the true owner by any mere constructive possession resting on an ideal enlargement of a trespass beyond its actual scope. In this case, while the proprietor of lot 8 had merely pushed his fence part of the way through his neighbour's land, interfering in no degree with his possession of the remainder, the neighbouring proprietor of lot 7 must be looked upon in law as constructively in possession of all that his title covered. He could not have convicted the proprietor of lot 8 of trespassing on land in the rear of lot 7, merely because he had placed his fence in front on a line with it: he had, as regarded that land, suffered no wrong, and therefore cannot be held to have delayed seeking a remedy, nor consequently to have lost any right by such delay."

In *Ferrier v. Moodie*, 12 U. C. R. 379, T. T. 18 Vic., ejectment for the west half of lot 7, 10th concession North Burgess, the plaintiff proved his title to the west half of lot 7, and the defendant proved his title to the east half of lot 7, and the dispute was as to the boundary between their respective lands. The plaintiff proved by a surveyor the proper division line, which shewed that the defendant had within his fence five and half acres belonging to the plaintiff. The land through which the division line ran was not cleared from the front to the rear of the lot, and the five and half acres was the quantity cleared which the

defendant had included within his fence: the remainder of the land was still in a state of nature not fenced in by either party. A portion of the land included within the defendant's fence was cleared and fenced by him more than twenty years before the commencement of the action, and a portion of it had been cleared and fenced within that time. The defendant relied upon establishing that in the year 1825 the plaintiff and he had agreed that a surveyor should run a division line, and that such a line was run between their possessions accordingly from front to rear of the lot and marked by trees being blazed, and that the land cleared and fenced in by the defendant was according to that line, both as regards what was cleared more than twenty years ago and what had been cleared within that period. The plaintiff gave evidence to shew that he had assented—by a verbal arrangement, as must be supposed, for nothing in writing was produced or alluded to in any way—to a line being run between the respective halves of the lot, but that the surveyor employed used only a compass for the purpose, (each party was to pay half of the expense): that after the surveyor had run half through the concession something went wrong with his compass and the line was never completed, and because it was not completed the plaintiff would not pay any part of the expenses, but said he would do so if the survey should be completed, but which in fact he contended had never been done.

The learned Judge left it to the jury to say what portion of the west-half of the lot had been in possession of the defendant for twenty years before the commencement of the action, and as to such portion he told them the defendant was entitled to succeed.

The learned Judge expressed to the jury his opinion that the plaintiff was not to be deprived of such portions of the west-half of the lot as might upon the defendant's side of the conventional line spoken of by any constructive possession which might be supposed to arise from a protraction of that line from the land of which the defendant was in the actual possession to the front and rear of the lot. The jury found generally for the plaintiff.

Burns, J., delivering the judgment of the Court says: "The defendant's counsel contends that the learned Judge misdirected the jury in telling them there must be an actual possession on the part of the defendant, and that there could not be a constructive possession to deprive the plaintiff of the land up to the conventional line spoken of. It is contended that the agreement between the parties to run such a line, and their subsequently holding according to that line in such portions of the land as were actually cleared and fenced more than twenty years ago, in law and in fact establishes the line, and the possession of the parties respectively will be determined according to such line.

If any agreement in writing had been shewn between the parties which would in law and in fact amount to a transfer and conveyance of the land according to a line to be run under an agreement to that effect, then it might perhaps be argued that a constructive possession might exist and follow such an agreement. Constructive possession will only be inferred where nothing militates against it in favour of the true title, and will not be inferred against the true owner in favour of one who shews no shadow or claim of title. Without examining the merits of the case upon the question whether there was in truth a parol agreement established that the parties should hold by a particular line, and upon which the jury it would seem have arrived at a proper conclusion, there can be no question the learned Judge stated the law correctly. The defendant could not rely upon the agreement alone if there were in fact one established to run a line between the parties, and that such a line was designated more than twenty years ago, without also shewing some visible occupation or possession of the land. The mere agreement and designating the line would not of themselves establish an actual possession of the land. Would they be sufficient to establish a constructive possession? I do not think they would. The kind of possession required successfully to defend an action of ejectment, must be such as would enable an action to be brought. If the plaintiff, after such

an agreement made and the line designated, had nevertheless ascertained the true line, and cleared and fenced up to it, the defendant could not, on any idea that the effect of the agreement and designating the line transferred to him a constructive possession, maintain an action of ejectment against the plaintiff. Then does the fact that the defendant has taken possession of a part and kept it for twenty years, establish a conventional line throughout the lot between the parties? No case can be cited to establish such a proposition, and it appears contrary to reason to say that twenty years actual possession of a part is necessary to confer title, and yet that constructive possession of another part will be sufficient. The only way in which the defendant can possibly argue the proposition is, that the actual possession of part carries with it the constructive possession of the whole. The answer to that is, that such presumption is never made except in favour of one claiming under colour of title; and further, it is a proposition inapplicable to a question of boundary in which the possession ought to be unequivocally indicated, and according to law must have so remained for the space of twenty years before the commencement of the suit."

In *Weld v. Scott et al.*, 12 U. C. R. 537, M. T. 18 Vic., trespass to north-half of lot 15, 1st concession, Delaware, the defendants justified cutting the timber complained of, as being on lot 14, under the authority of the owner of lot 14. The plaintiff had a verdict.

Robinson, C. J., says: "The evidence shewed that the trees had been cut not on 15 but on defendants' land, 14 in the first concession, though, according to an erroneous line which a surveyor had run more than twenty years before, it was made out to be part of 15. The plaintiff claimed however by virtue of his actual possession, and the question was whether he could be rightly held to have been in possession of the *locus in quo* in such a manner as was sufficient to convey title after twenty years under the Statute of Limitations. * * The defendants gave no evidence of any right on their part; and therefore, as it was

not a question of conflict of titles, all that the plaintiff had to shew was that he was sufficiently in possession at the time of the alleged trespass to entitle him to recover for trees cut down and taken away from the tract described.

* * Now as to the true state of the case, whether the trees had been cut on lot 15 or lot 14, there seems to be no doubt, when we examine the evidence. They were taken from lot 14, as a correct survey has established. Then these defendants had at least a right to put the plaintiff, as they did by their pleadings, to shew on what pretence of right he called the close his, and the timber his; and what right did he shew? He proved no title to any part of this lot 14, but relied wholly on an alleged possession. And what was that possession? He had never occupied, used, or cultivated any portion of the lot, but had enclosed wrongfully a part of the lot 14 in the broken front concession, coming to the river, and lying in front of the lot 14 in the first concession. He, or those preceding him in the title to 15, had by mistake, and relying upon an unauthorized and erroneous survey, fenced in a part of the lot 14 near the river, when they ought to have confined themselves to the limits of 15; and no doubt meant to do so; but that fence, erected twenty years ago and more, did not even extend back to any part of the lot 14 in the first concession which is now in question, and never has been carried back so far as the woodland on which these trees were felled.

So this is the case of a person not holding title, for anything that appears, to any part of lot 14, in the first concession, and not visibly or actually occupying it, claiming, nevertheless, to be constructively in possession of all of it, because he has wrongfully and in error encroached on a part. The trees cut were clearly not his, nor the close his. We think to allow the plaintiff to recover on the evidence that was given would be contrary to the legal principle constantly upheld and frequently made the ground of decision in this Court, that a person wrongfully in possession of any land belonging to another which is not covered by any title under which he can assume to hold it, gains no

right under such possession to more than the land which his actual possession covers. He is confined to what has been called his pedal possession, and even occasional acts of trespass committed by him on other parts of the property will not be taken as extending his actual peaceable possession over such parts. The distinction between such an occupant and another, who either shews a right to the whole land in question or is residing upon and cultivating part of a lot of land to the whole of which he claims title under conveyances which, if they were valid, would cover the whole, is, that the latter classes of occupants are regarded as being constructively in possession of the whole lot covered by their deeds while they are in possession of a part, but a mere trespasser's occupation is not to be extended in contemplation of law by any such construction."

In *Allison v. Rednor*, 14 U. C. R. 459, T. T. 20 Vic., ejectment for part of lot 74, 6th concession Hillier, the plaintiff proved his title to the land in question. The defendant defended for a portion of the land to which the plaintiff proved title, being a strip of land three chains and fifty links in width, of which he was in possession, on the west side of the plaintiff's land, and extending along the whole length thereof: that he went into possession of it in 1826 in conformity with a line run by a surveyor in 1825 to ascertain the western boundary of the plaintiff's land, and had been in possession of it ever since. Part of it in the front was cleared, and part of it in the rear was woodland. The plaintiff purchased previous to 1826, and he had been repeatedly at the defendant's house, and was aware of his improvements from that time up to the time of bringing the action, upwards of twenty-four years, as proved by the evidence of defendant's son. But it was not shewn that the plaintiff was aware of the defendant's exercising any control over the woodland in the rear for so long a period; and the jury in consequence rendered a verdict for the defendant for the cleared land, and for the plaintiff for the woodland in the rear part of the premises.

Robinson, C. J., says: "As to the verdict on the question of boundary, I think the defendant has no reason to complain of it. He gets more than his just share in getting the land which he has illegally cleared. As to his chopping trees and cutting wood on the unimproved land, he relies on his having done that for more than twenty years, as giving the land now by long possession; but those are occasional acts of trespass which do not give him a title under the Statute of Limitations. The evidence shews that he was not scrupulous, but cut where he liked, without regarding the lines, as any trespasser might have done. That is not an uninterrupted exclusive possession."

In *Bell v. Howard*, 6 C. P. 294, T. T. 20 Vic., Draper, C. J., thus refers to *Doe Beckett v. Nightingale*, to the judgment in which he was a party: "I should be sorry to decide anything in the least degree inconsistent with the principle of *Doe Beckett v. Nightingale*, and of similar decisions. I take that principle to be that, though by erecting and maintaining for twenty years a fence between his and the adjoining lot as a boundary fence, a man may acquire a right to hold thereby, although such fence does not stand on the true line of division, according to the original survey, and may, after twenty years occupation so taken or held, successfully resist an action of ejectment brought by the owners of the adjoining lot to recover possession of the portion thus encroached on, yet such encroachment will not be extended by any implication or constructive possession beyond the limits thus actually fenced in, nor give the right to insist on the course of that fence as establishing the course of the line of division between the lots, further than the fence has been erected and maintained for twenty years, the proprietor of the adjoining lot being only placed under the necessity of asserting his rights by an actual and continuous encroachment and occupation on the part of his neighbour."

But he considered *Bell v. Howard* to be more within the principle of *Dennison v. Chew*, and that it was a question proper to be submitted to the jury upon the evidence

whether a division line had been adopted and agreed upon between the owners and occupiers of these two lots, according to which they had used, occupied, and enjoyed for more than twenty years before the commencement of the action ; and that if there had been a division line so agreed upon, and the occupation of the respective proprietors had been so mutually limited thereby for twenty years or upwards, the parties would be bound by it, though on an accurate survey it should be found to vary from the true division line ascertained according to the original plan of the survey. Then, after referring to the evidence in that case, he says : " I think this is evidence of occupation on the one hand, and of acquiescence on the other, of mutual agreement as to the boundary and of waiver of any right to set up or claim any other boundary ; and if believed by the jury sufficient to warrant their verdict, which was in fact rested on this ground."

In granting a new trial in *Wideman v. Bruel*, 7 C. P. 134, T. T. 21 Vic., Draper, C. J., says : " The right will be bound in this action," (one of trespass) " and the plaintiff relies on a conventional line fifty years old, clearly adopted in one part, and on a possession of at least twenty years of the part where the trespass is committed. I certainly am impressed with the belief that in respect to the true course of the boundary line, if it turned upon that, the defendant would be found entitled to prevail ; but I think also that compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed ; and if, moreover, an actual possession of twenty years in accordance therewith can be shewn, it makes the plaintiff's a meritorious claim."

In *Martin v. Weld et al.*, 19 U. C. R. 631, T. T. 24 Vic., the plaintiff and defendant owned adjoining lots, and while the plaintiff was putting up a fence on what he claimed to be the proper line, the defendant came up to him and cut up some of the rails, and for this injury the plaintiff brought trespass. The learned Judge, Richards, J., told the jury that he thought the survey on which the defendant relied

appeared to be correct, and if it were then he was justified in entering upon his own land and cutting up his own rails, for they had just before been made from a tree cut, as it seemed, on the defendant's side of the division line, unless indeed the jury should be satisfied from the evidence that the plaintiff had been twenty years in actual possession of the *locus in quo* by inclosing and using it, as to which the evidence was contradictory, and perhaps left the point uncertain. The plaintiff had settled upon his lot in 1829 and continued ever since to reside upon it, and according to some evidence given on his part, he had for more than twenty years been in actual, exclusive possession of the piece of land in dispute, at least of that part of it where the alleged trespass was committed by the defendants. The evidence on the part of the defence, however, tended to prove the contrary. The jury found for the plaintiff.

Robinson, C. J., says: "We do not consider that the fact, (if the truth was so) that the plaintiff and defendant were under a common error in regard to the true line of division between them, would prevent the new Statute of Limitations running, though it might and has been allowed to do so under the former law, when it was necessary to make it appear that the possession for twenty years was adverse and not with acquiescence or permission. If it were shewn that a line had been agreed to between the respective proprietors, and that it was understood it should govern whether perfectly correct or not, the case would be different. That would be a conventional line binding upon both parties, on the principle of an estoppel *in pais*. Here, according to the true line of division, if that alone should govern under the circumstances, the defendant would seem entitled to a verdict, but the evidence of possession being held by the plaintiff for more than twenty years of the *locus in quo* does seem to be sufficient to warrant the verdict."

In *Bernard v. Gibson*, 21 Gr. 195, 1874, the then Chancellor, now Chief Justice of Ontario, referring to *Bell v. Howard*, says: "The case was not decided entirely

upon the Statute of Limitations, but upon compact that the line run should be accepted as the true line, as also of waiver of right to set up any other line. I doubt if what is put as compact and waiver amount to it, but that appears to have been the *ratio decidendi*."

It is probable that the learned Chancellor would have agreed with the law as laid down in *Ferrier v. Moodie* as to compact, had that case been cited to him in *Bernard v. Gibson*.

In my opinion, adjoining proprietors cannot be bound to a line run between their respective properties as a division line, but which is not the true line, except by such a contract or one so acted upon as a Court of Equity would enforce specific performance of, by compelling the parties to abide by it, and by directing conveyances to be executed and possession delivered according to it.

In this case there is no pretence for saying that there is any evidence of any contract to abide by the line run by Lynn.

The parties employed him not to make a division line for them, but to ascertain the true division line between their respective properties, and there was no intention on their part, nor is there anything in the evidence from which it can be reasonably inferred that they had any intention, of being bound by the line run by him, whether it was the true line or not.

The authorities above quoted shew clearly that the parties were not bound by this line.

Nor had the running of the line, in my opinion, any effect upon the rights of the parties.

Lynn was employed to ascertain the true line. If he failed to do this, what he did was of no avail, and could in no way affect the rights of the parties.

The blazes that he made, and what he did along the line run by him, if acts of possession at all, would, he being the agent of both parties, be ascribed to and enure to the benefit of the party who had the title to the land upon which these acts were done, and could in no way enure to the benefit of the other party.

If the line so run could be looked upon as a fence, or as the mythical "line of sentries," it would have had, continuing as it did for more than ten years, a much greater effect if run by or on behalf of the defendant alone, for it might then be looked upon as an enclosing by him of all the land within its limits as his own.

But it cannot be so looked upon. There is no authority for such a proposition, and such a suggestion has never hitherto been made, and if it could be so looked upon, then *Doe Beckett v. Nightingale*, *Weld v. Scott*, and *Allison v. Rednor*, in each of which cases such a line had been run more than twenty years before action, were wrongly decided.

The decision of this Court, moreover, in *Ferrier v. Moodie*, above quoted, shews that the running of such a line as was run by Lynn can of itself have no effect whatever upon the right of the parties. See also *Kay v. Wilson*, 2 App. Rep. 133.

The case must therefore depend upon the kind of possession the defendant has had of the plaintiff's land on the side of the Lynn line adjoining the defendant.

And the question for determination is, what kind of possession must an adjoining land owner have of his neighbour's land upon which he has encroached to extinguish the title of his neighbour to it.

The principle of the decisions of *Dundas v. Johnston*, 24 U. C. R. 547; *Heyland v. Scott*, 19 C. P. 165; *Davis v. Henderson*, 29 U. C. R. 344, and *Mulholland v. Conklin*, 22 C. P. 372, namely, that where a person is in possession of land under a defective title he is deemed to be in possession of the whole of it according to the limits of the description of it contained in the conveyance of it to him, has no application to a case like the present.

This principle is also referred to in *Doe McDonnell v. Rattray*, 7 U. C. R. 321; *Ferrier v. Moodie*, 12 U. C. R. 379; *Weld v. Scott*, 12 U. C. R. 557; *Meyers v. Doyle*, 9 C. P. 371; *McKinnon v. McDonald*, 13 Grant 152; *McMaster v. Morrison*, 14 Grant 138, and in *Wigle v. Merrick*, 8 C. P. 307.

It is not for me to say whether this principle is well founded or not, or whether it should have been or should be extended beyond the case of a person in actual pedal possession of land under a conveyance which he honestly believed, and was justified in believing, conveyed to him the true title to the land.

It is sufficient for me to point out that this Court, in *Ferrier v. Moodie* and in *Weld v. Scott*, above quoted, the Court of Common Pleas in *Meyers v. Doyle*, 9 C. P. 371, Richards, J., in *Wigle v. Merrick*, 8 C. P. 307, have held expressly that this principle does not apply to a question of boundary.

Where an adjoining land owner encroaches upon his neighbour's land, he is encroaching upon land to which he has no title and to which his neighbour has the title, and he is in no different position as to the land encroached upon than any other person without title, and can only acquire title to the land so encroached upon by having the same kind of possession of it as one without title, not an adjoining land owner, or not a land owner at all, would require to have of it to acquire title to it.

The law is not so absurd as to hold that, because an adjoining land owner has greater facilities for encroaching upon his neighbour's land than another has, the Statute of Limitations shall be more liberally construed in his aid than it would be in aid of such other.

Possession is the word used in the statute, because it was the only word properly applicable to all the classes of subjects, corporeal and incorporeal, included under the term "land," as defined in that Act, that could be used; but when applied to land in the ordinary acceptation of that term it means "occupancy."

Various decisions in our Courts have attempted to define the kind of possession the trespasser must have of land, in order to extinguish the title of the true owner to it, but unfortunately they do not all define it alike, nor do they all define it with that precision which enables those who are bound by the law to know what it is; and this arises

in a great measure, no doubt, from the difficulty of defining it with precision and accuracy.

According to *Doe Hill v. Gander*, above cited, there must be an actual dispossession of the true owner by an actual and exclusive occupation by the trespasser.

The trespasser cannot gain the right to the land by establishing a wrong through nothing but a constructive and imaginary possession: the true owner must be actually dispossessed and excluded from his land, and cannot be barred of his right by any mere constructive possession resting on an ideal enlargement of a trespass beyond its actual scope: *Doe Beckett v. Nightingale*, 5 U. C. R. 518.

The commission of occasional acts of trespass in cutting timber will amount to nothing. There must be an actual occupation to the exclusion of the true owner, to enable the statute to operate in bar of the true title, and such bar will only apply to the part of the property occupied: *Doe McDonell v. Rattray*, 7 U. C. R. 321.

Constructive possession will not be inferred against the true owner in favour of a trespasser. There must be some visible occupation or possession of the land. It must be such a possession as would enable the trespasser to successfully maintain an action of ejectment for it. It ought to be unequivocally indicated, and must have so continued for the statutory period: *Ferrier v. Moodie*, above cited.

He gains no right to more than the land which his actual possession covers. He is confined to what has been called his pedal possession; and even occasional acts of trespass committed by him on other parts of the property, will not be taken as extending his actual peaceable possession over such parts. A mere trespasser's occupation is not to be extended in contemplation of law by any construction: *Weld v. Scott*, above cited.

As to his chopping trees and cutting wood on the unimproved land, he relies on his having done that for more than twenty years, as giving the land now by long possession; but those are occasional acts of trespass which do not give him a title under the Statute of Limitations. That

is not an uninterrupted exclusive possession: *Allison v. Rednor*, 14 U. C. R. 459.

Though by erecting and maintaining for twenty years a fence between his and the adjoining lot as a boundary fence, a man may acquire a right to hold thereby, although such fence does not stand on the true line of division according to the original survey, and may after twenty year's occupation so taken or held successfully resist an action of ejectment brought by the owners of the adjoining lot to recover possession of the portion thus encroached on, yet such encroachment will not be extended by any implication or constructive possession beyond the limits thus actually fenced in, nor give the right to insist on the course of that fence as establishing the course of the line of division between the lots further than the fence has been erected and maintained for twenty years, the proprietor of the adjoining lot being only placed under the necessity of asserting his right by an actual continuous encroachment and occupation on the part of his neighbour: *Bell v. Howard*, 6 C. P. 294.

As against the true owner, in a case of boundary, the jury must be satisfied that the plaintiff had been in actual possession of the *locus in quo*, by enclosing and using it: Per Richards, J., in *Martin v. Weld*.

"The evidence shews actual possession and occupation by Fletcher of not more than five acres. His possession of the residue was no more than constructive. If a man without title enters on a lot which is in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone, in my opinion, draw to it the possession of the other part. I do not say what may be the effect of *continuous acts* of ownership over the residue, though unenclosed and uncleared, but here there is no such evidence to rest upon." Per Draper, C. J., in *Hunter v. Farr*, 23 U. C. R. 324.

"On a question of boundary a man's title by possession is no doubt confined to what he actually occupies." Per Hagarty, J., in *Hunter v. Farr*, 23 U. C. R. 329.

"In cases of what is well understood in the country by the term 'squatters,' I have always thought that, as against the real owner, they acquire title by twenty years' occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession." Per Draper, C. J., in *Dundas v. Johnston*, 24 U. C. R. 550.

"I told the jury that a series of independent acts of trespass, each of them unconnected with the preceding or subsequent acts of trespass, would not in law amount to a possession: that the owner, by virtue of his title, was in possession in the eye of the law, though the land was in fact unoccupied, and that a wrongdoer who entered upon the land must shew dispossession of the true owner by visible and continuous possession for twenty years in himself and those under whom he claims: that such possession must extend over the whole of the land defended for, because such possession of a portion of a large lot could not by construction of law be deemed possession of the whole lot." Per Draper, C. J., in *Young v. Elliott*, 25 U. C. R. 333-4.

"In order to bar the true owner under the statute, there must not only be an entry on the land, but a visible and notorious continuance of the possession so taken during the statutory period. Mere surveys, occasional occupancy, as by the use of a sugar bush during the season, the cutting of timber, even accompanied by the payment of taxes, ought not to have the effect of defeating the true owner; but to have that effect the possession relied on should be so open, continuous, and notorious, that the owner may be presumed to have notice of it. A distinction has been drawn, and very properly drawn, between the case of a person taking possession without any colour of right and that of one entering under colour of title by some written document, who would thereupon

acquire in law possession to the extent of the boundaries contained in the writing, although the title assumed to be conveyed by it might be good for nothing, whilst the possession of the other would comprise no more than the portion actually enclosed and occupied ; but in both cases an actual visible occupation or possession of some portion of the land is necessary for the full period of twenty years :” per Burton, J. A., in *Kay v. Wilson*, 2 App. R. 136.

“ By a long unbroken chain of decisions, extending over a period of upwards of forty years, it has been held by the Courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation, by some person or persons (it matters not whether in privity with each other in succession or not) to the exclusion of the true owner for the full period of twenty years, and that to transfer the title to the person in possession at the expiration of the twenty years such person must claim privity with the persons preceding him in the possession during the period of twenty years, unless he himself was continuously in such possession during that period, the difference being that, while any person in possession, after the title of the true owner is barred by a possession to his exclusion for twenty years, may defend successfully an action of ejectment brought by the original owner, however short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the twenty years, yet no one can *recover as plaintiff* in ejectment in virtue of a *title acquired* by possession against the true owner for twenty years under the provisions of the statute, unless he himself alone, or in privity with others in possession before him, had that continuous possession which was required to *bar* the true owner ; and payment of taxes, or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual visible possession, will avail nothing towards establishing the possession which the statute requires :” per Gwynne, J., in *McConaghy v. Denmark*, 4 S. C. R. 632-3.

These cases clearly shew that the kind of possession which an adjoining land owner must have of his neighbour's land upon which he has encroached, to extinguish the title of his neighbour to it, must be an actual, constant, continuous, open, visible, notorious, exclusive, uninterrupted, unequivocally indicated occupation of it, by enclosing it and using it.

I have already adverted to the principle of decision of *Heyland v. Scott*, 19 C. P. 165; *Davis v. Henderson*, 29 U. C. R. 344, and *Mulholland v. Conklin*, 122 C. P. 372; but I must revert to them, because in every contest between the true owner of land and the person striving to deprive him of it and acquire it by wrong, they are invariably cited and relied on by the wrongdoer, and certainly there are expressions in them well calculated to afford aid and comfort to the wrongdoer.

So far as those expressions are applicable to the principle involved in those cases, I have nothing to say of them, because, as I have already pointed out, that principle is in no way applicable to the case in hand.

So far however as those expressions are applicable to or were intended to apply to cases where, as in this case, the person seeking to deprive the true owner of his land and to acquire it himself has no colour of title to it, they are extra judicial and of no binding authority.

In *Heyland v. Scott*, 19 C. P. 172, it is said: "We are not prepared to hold that unenclosed woodland in this country can never be the subject of a twenty years possession. If fencing and cultivation can alone constitute a possession, then title to open woodland can never be acquired against the true owner."

Davis v. Henderson, 29 C. R. 344, was the judgment of Morrison and Wilson, JJ., the Chief Justice (Richards), to whose views, as expressed in *Martin v. Weld*, I have already referred, being absent.

Morrison, J., in his judgment, p. 360, expressly disclaims it applying to cases of persons "whose occupation of land commences without any shadow of right or title to any definite portion or quantity of land."

"I see," he says, "a distinction between such occupants and one who goes into possession under a title which is discovered to be defective."

Wilson, J., says, p. 353: "Now, how is wild land to be possessed? It is settled that it need not be enclosed. What better test can there be of its possession than that the person whose possession is questioned should have used it just the same as any other owner uses his wild land, by asserting title to it, by giving licenses to cut timber from it or to pass over it, by excluding others from cutting or travelling over it, by cutting or travelling over it himself at his pleasure, by preserving the timber upon it, though he never has cut a stick himself, or by any other acts or evidence from which it may fairly be presumed he has taken the possession of the woodland as well as of the cleared."

Then, after paying a tribute to the moral claim of the person who has acquired his neighbour's land by wrong, he proceeds: "In my opinion, when any person enters on a lot or half lot, or on any defined piece of land, wild, or partly cleared and partly wild, under colour of right or otherwise, and holds possession for the statutable period, the question for the jury should always be, as to the wild land, whether the person whose possession is in question has claimed or held the wild land (for there is no misunderstanding as to the cleared land) as owner, and has used it in like manner as the owners of lands who have uncleared and unenclosed portions on the lots they occupy usually use their wild lands, by such acts of ownership as owners are accustomed to exercise; or whether the acts of the person in question have been the acts of a mere trespasser not done and not intended to have been done in the assertion of right, title, or ownership."

Mulholland v. Conklin contains no new expression of opinion, but merely quotes from *Heyland v. Scott* and *Davis v. Henderson* the expressions which I have quoted from them.

These expressions, so far as applicable or intended to

apply to a case like the present, I cannot concur in; for they do not approve themselves to my reason and sense of justice, and they are wholly opposed to all the previous decisions of the Courts in this country on the subject.

In my opinion a person entering upon land without any title to it cannot deprive the true owner of it, except by having it at the least substantially enclosed for the whole of the statutory period.

An American case which prescribes this as a prerequisite, is cited with approval by Robinson, C. J., in *Doe Hill v. Gander*, and Richards, J., did but express the manifest meaning, spirit, and effect of all the previous decisions of the Courts in this country, when he told the jury, in *Martin v. Weld*, that they must be satisfied from the evidence that the plaintiff had been twenty years in occupation of the *locus in quo* by enclosing it and using it.

In *Doe Jackson v. Schoonmaker*, 2 Johnson 232, in 1807, Kent, that eminent jurist, then Chief Justice of the Supreme Court of the State of New York, laid it down that "there must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title."

This decision has been followed ever since in the State of New York, and so much has it commended itself to the judicial mind that it has been adopted and followed in nearly every other state in the Union.

"It may be stated," says *Wasbburn* on Real Property, vol. 3, page 496, "as a generally conceded principle, that acts of disseisors are in respect to the lawful owners or true proprietors to be limited to an actual ouster and an exclusive occupation by such disseisors, and as many cases say, to what one has under actual improvement and within a substantial enclosure."

It is not too much, in my opinion, to require of the much favoured intruder that before he shall successfully extinguish the title of the true owner to the land upon which he has intruded he shall shew that he has openly indicated

his intention to assume dominion over it by having it substantially enclosed for the statutory period.

When such enclosure took place, and to what extent, would always or mostly always be susceptible of proof by disinterested witnesses, and the true owner would not be at the mercy of the oath of the unscrupulous intruder as to the time when and the extent to which he had committed those trespasses, which, according to the effect of what I have quoted from *Davis v. Henderson*, would extinguish the title.

It may be that if enclosure were held to be necessary, as I think the law is, that then title to open woodland could never be acquired by a mere intruder against the true owner; but I do not think that that would be a subject for lamentation.

The division of lands into lots was made by the Crown for purposes of title only, and I do not therefore see why one entering upon land without title should have his possession extended to the limits of the lot or lots upon which he has entered, which limits were assigned to the lots for the purposes of title only, and not for the benefit of trespassers.

But if anything is settled it is that the possession of the mere intruder is not to be extended by construction; and if we require, as I think the law as it now stands requires, that substantial enclosure by the intruder for the statutory period shall be necessary for the extinguishment of the title of the true owner to the land so enclosed, we shall be adhering to and laying down a clear and well defined rule, one by which questions of possession can be readily settled and determined, and one which will enable those who are bound by the law to know the law, and will relieve them from the uncertainty of what may be deemed a sufficient possession by the diverse and ill defined notions which each Judge or jury may entertain on the subject.

Statutes of Limitation, so far as they operate to bar or extinguish existing rights, are immoral legislation, and tend

to lower the moral tone of society : they have only been justified, and are only justifiable on grounds of public policy, *ut sit finis litium*, and on these grounds they may perhaps be called beneficial by some ; but I cannot agree in calling a statute beneficial which enables one man to acquire the land of another by wrong ; nor can I agree that the man who has so acquired the land of another has a stronger moral claim to it than the man from whom he has so acquired it.

These statutes so far as they interfere with existing rights are to be construed strictly: Per Kindersley, V. C., in *Edmunds v. Waugh*, L. R. 1 Eq. 421 ; and as was said by Robinson, C. J., in *Doe Shephard v. Bayley*, 10 U. C. R. 318, " No man's legal title should be extinguished by the operation of this statute unless the facts are such as do clearly, and without the aid of any liberal construction, bring his case within it ; and that he should have the full benefit allowed him of every exception which fairly takes his case out of the statute. So much at least is due to the former owner of the estate."

If such a rule was necessary to be adhered to when the statutory period was twenty years, how much more is it necessary that it should be adhered to now that the Legislature has increased the facilities for land stealing by reducing it to ten years !

The question of possession is a mixed question of law and fact. What kind of possession it is necessary that a man who enters upon land without title should have of that land in order to extinguish the title of the true owner to it is a question of law. Whether that kind of possession has been had is a question of fact.

The learned Judge who tried this cause has found that the defendant has always been in possession according to Lynn's line, but he has not found what kind of possession he has had. As to that portion of the land in dispute which has been enclosed for more than ten years, no doubt the plaintiff's title to it has been extinguished ; but as to the residue of the land in dispute, there is not a solitary

act of possession shewn to have been done upon it by the defendant at a longer period before this action was commenced than three or four years, unless his merely claiming the land can be said to be an act of possession.

"No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action:" R. S. O. ch. 108, sec. 9.

In the face of this provision as to a person with title, it is going rather far, I think, to hold that the mere claim by one without title of his neighbour's land, will be sufficient to extinguish his neighbour's title to it, and give it to the claimant.

In my opinion the defendant has not had that kind of possession of that part of the land in dispute, which has not been enclosed for ten years to extinguish the plaintiff's title to it.

CAMERON, J.—There is no question of law involved in this case or presented upon the argument except the one raised by Mr. Masson, that the 11th and 12th concessions, divided merely by a blind line, were intended by the original plan of survey to be equal; and consequently, assuming that a stake had been planted as contended here, on the side road between lots 24 and 25, that would not determine the boundary between the two concessions or side lines between the lots in the concessions, which according to the direction of section 62 of the Act respecting land surveyors and the survey of lands, ch. 146, R. S. O., must be run to the centre of the space contained between the alternate concession lines; and the work on the ground would not necessarily determine the side lines, as at most it would only define the length of the south side line of 25, leaving the northern line between 25 and 26 to be determined by survey to the centre of the space between the alternate concession lines. If the case had to turn on this point alone, it might be necessary to send it down for trial again to obtain further evidence; for assuming that the stake at the blind line on the side road between lots 24 and 25,

would define the depth of the 11th concession at that point, it does not appear from the evidence whether there was a stake in fact planted on the blind line at the next side road to the west, or the position of such stake if planted, which is information the Court should be placed in possession of before it can properly determine what would be the end of the side line between lot 25 and 26—a point that would have to be determined in ascertaining the boundary line between the plaintiff and defendant.

If the position of the stake on the blind line at the side road or boundary of the block north of lot 25, can be ascertained, I assume, under section 46, a line between that stake and the stake at the side road between lots 24 and 25 would be the boundary between the two concessions, and would determine the length of the side lines of lot 25.

In the view I take of the evidence in this case it is not necessary to decide that question. I am of opinion there is ample evidence to uphold the finding of the learned Judge, as the defendant established a statutory title to the land on which the trespass is alleged to have been committed, and the true boundary of the plaintiff's portion of the lot, according to his paper title, is unimportant. It is clear from the evidence of the plaintiff and defendant, and other witnesses, that as long as fifteen years before the commencement of this suit a line had been run by the surveyor Lynn to define the line between the plaintiff's and defendant's land: that this line was acted upon by both, neither assuming the right to go beyond his own side of it: that fences were built for a considerable distance along it, as the parties cleared for cultivation, and the possession of the defendant of the land on the west side of the line was so clearly recognized by the plaintiff that he notified the defendant, according to his own statement, if the trees fell from that side on the plaintiff's cleared land he, defendant, would have to remove them. It was not till the year 1878, after the defendant had acquired a title by possession, that any attempted

actual interference on the plaintiff's part with the defendant's possession took place. I have said the defendant's possession—not overlooking the argument that a surveyor's line, though run by consent of the parties, will not, *per se*, constitute evidence of possession, and that a fence or other visible obstruction must exist to exclude the true owner of land and others to constitute such an actual possession, where the land is in a state of nature, as will deprive the true owner of his title under the statute.

The question of possession is one of fact and not of law, and must be determined by the evidence in each particular case, and had there been no authority upon the point, I should have unhesitatingly held that the evidence in this case most unequivocally disclosed an actual possession of the land on which the trespass was committed, sufficient to put an end to the plaintiff's title, and to give a statutory title in fee to the defendant.

I am clearly of opinion that if two persons actually living on parts of the same lot verbally agree that a particular line shall be deemed the boundary between them, and they go on using the land in the same manner as they would have done if the true boundary had been the same as their conventional line, each party must be considered in the actual possession of the land on his own side.

I do not see how the putting up a fence along the line would make acts evidence of possession that would not have had the same force if only a surveyor's line had been run, and acts in the former case that would have been acts of possession and ownership made in the latter only acts of desultory trespass. In reason, what difference would it have made to the present plaintiff if the fence begun at the side road by the plaintiff himself had been continued all the way across the lot? It would not have been any more positive notice to him that the defendant claimed the land west of the fence than what was done here to shew he claimed the very same land. I assume if a person went on to a lot of land and put a fence around ten acres of it, and then never went near it for nine years, when he

returned and occupied it for a year, it could not be said he was in possession so as to give him a statutory title. The fence would only be a circumstance or incident to be considered in determining whether he had the possession or not. The cases of *Davis v. Henderson*, 29 U. C. R. 344; *Heyland v. Scott*, 19 C. P. 170; and *Mulholland v. Conklin*, 22 C. P. 372, preclude this Court from disturbing the verdict in favour of the defendant on the ground that, as matter of law, there was not evidence to support it; and, as a matter of fact, I entirely concur in the finding.

As a test as to whether the defendant had actual possession of the land claimed south of Lynn's line, suppose a stranger had entered and cut timber, would what had taken place on Lynn's survey entitle the defendant to maintain trespass, without proving any further title to the land? I think it would be impossible to say there was not evidence of possession to go to the jury, and *a fortiori* it must be held, as against this plaintiff, who was a party to the act which would enable the defendant to shew the boundary of the possession, there was also evidence of possession under the Statute of Limitations. Of course, as the case was decided by the Judge, his decision is open to review upon the weight of evidence, as well as upon any other ground; but, as I have already stated, my opinion as to the weight of evidence is entirely in favour of the defendant, and no ground has been shewn to justify an interference with the finding of the learned Judge.

The plaintiff's rule should, therefore, be discharged.

Rule discharged.

DEVLIN V. THE QUEEN INSURANCE CO.

Fire Insurance—Omission of statutory conditions—Wilful neglect of insured to save property—Liability of company thereupon.

Action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the 11th of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the 17th condition, the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save and prevented others from saving, the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent over-valuation.

Held, that under the late decision of the Privy Council in *Parsons v. Citizen's Ins. Co.*, the policy must be taken to be a policy within the statutory conditions only; and a new trial was granted in order that the case might proceed as upon such a policy.

Semble, however, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property.

DECLARATION on a fire policy, dated 6th July, 1880, covering \$1,800 on goods, averring loss, &c., &c.

Pleas:—1. That the property was destroyed by the unlawful and malicious act of the plaintiff.

2. That the plaintiff wilfully neglected to save, and unlawfully prevented others from saving the property, and but for such wilful neglect and unlawful act of the plaintiff the property would not have been destroyed.

3. That at the time the insurance was effected it was agreed that in case of fire it should be the duty of the plaintiff and his servants to do all in their power to save and protect the property and prevent further injury thereto, and in case of removal of property to escape conflagration, to contribute ratably, &c., and that the non-fulfilment of said stipulation should entail the forfeiture of all benefit under the policy. Averment, that the plaintiff and his servants did not do all in their power, nor take any means to prevent further injury, but wilfully and

negligently omitted to save same, and actually prevented others from doing so.

4. Traverse of loss.

5. Policy obtained by plaintiff's fraud.

6. Setting up a condition for forfeiture if a fraudulent claim were made, averring fraudulent overvalue as to loss.

Issue on all the pleas, and replication to the sixth plea, that the policy had issued since R. S. O. ch. 162: that it had not the "statutory conditions," nor were there any variations of conditions upon the same, and the policy as against defendants was a policy without conditions.

Particulars of fraud were given before trial, being as to fraudulent statements with respect to the value of the property when insured, and as to representations concerning previous fires.

The case was tried at Toronto before Wilson, C. J., and a special Jury.

The following questions were submitted to the jury:

1. Was the building fired wilfully by the plaintiff?

Answer—No.

2. Did the plaintiff wilfully neglect to save or prevent others from saving the insured property? Answer—Yes.

3. If the plaintiff acted as in the second question, did that prevent his goods being saved? Answer—Yes.

4. Was there any fraud on the part of the plaintiff in procuring the policy. Answer—No.

5. What was the value of the plaintiff's stock at the time of the fire? Answer—\$1,000. Of his shop fixtures? \$400? Clothing and furniture? \$150.

The verdict was thus entered:

"Verdict on first and fifth issues for plaintiff. On second and third issues for defendants.

And the jury say the value of the plaintiff's loss was \$1550, which I enter for plaintiff on fourth plea.

The jury do not agree as to the sixth issue; that is, as to the claims of loss being false and fraudulent."

The facts sufficiently appear in the judgment.

May 19th, 1881. *J. K. Kerr*, Q. C., for the plaintiff, obtained a rule *nisi* to set aside the findings on the second and third pleas, and for judgment *non obstante* such findings, on the ground that on the evidence the verdict should have been entered for the plaintiff on the issues joined on such pleas; or why the verdict should not be set aside and a new trial had on the law, evidence, and weight of evidence.

Osler, Q.C., for defendants, also obtained a rule *nisi* to set aside the verdict for the plaintiff on the first and fifth pleas, and the finding on the fourth plea, on the evidence, weight of evidence, and Judge's charge; or, in the event of the plaintiff's rule being discharged, and the verdict for the defendants allowed to stand, and the second and third pleas held good, to strike out the first, fourth, fifth, and sixth pleas and the issues joined thereon.

Both rules were argued together on the 31st November and 1st December, 1881. *Osler*, Q. C., and *Small* shewed cause to one rule and supported the other. The second plea, which pleads in bar to the whole action the wilful neglect of the plaintiff, and his wilful prevention of others from saving the goods insured, was found by the jury in the defendants' favour. The plea is good in law. In *Chandler v. The Worcester Ins. Co.*, 3 Cush. (Mass.) 328, it was held that the not putting out a fire which was yet trifling avoided the policy. See also *May on Fire Insurance*, (ed. 1875) secs. 410, 411. In *Citizens' Ins. Co. v. Marsh*, 41 Penn. 386, it was held that loss by misconduct was not covered by the policy. See also *Angell on Insurance*, secs. 115, 116, 117. In *Marshall on Fire Insurance*, 207, it is stated "that upon principles of natural justice the insurer can in no case make himself liable for loss or damage proceeding directly from the fault of the assured." As to granting a new trial, it is submitted that the verdict in favour of the defendants should be allowed to stand. In addition to the finding of the jury in favour of the defendants, there was strong evidence to support the pleas of arson and of fraudulent overvaluation on the part of the

plaintiff. The stock was unquestionably largely overvalued in his application for insurance, and greatly overinsured. Hence the reason for the non-salvage. The actions of the plaintiff at the fire, in closing the door and preventing persons who were within from saving anything, his spreading reports (shewn to be untrue,) of dangerous and explosive materials in his shop, were, with many other facts, sufficient to sustain the finding of the jury.

J. K. Kerr, Q.C., and *W. R. Mulock*, contra. The findings in favour of the defendants are on the second and third pleas, both of which are bad in law. The third plea is founded on the company's own condition, which not being in accordance with the statute is of no validity. The verdict on this plea must therefore be set aside. As to the second, which is founded on the alleged rights of the parties at common law, the cases do not support the contention of the defendants. See *Goodman v. Harvey*, 4 A. & E. 876; *Wood on Insurance*, 223, 226; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Gove v. Farmers' Mutual Fire Ins. Co.*, 5 Bennett's Insurance Cases, 181; *Dixon v. Sadler*, 5 M. & W. 405; *Busk v. Royal Exchange Ins. Co.*, 2 B. & Al. 73. It is submitted that the evidence did not sustain the finding of the jury in the defendants' favour, and that there was no evidence of fraud or arson on the part of the plaintiff.

February 13, 1882. HAGARTY, C. J.—In this case the interim receipt, dated July 6th, 1880, two or three months before the fire, states that the applicant proposed to effect an insurance "subject to all the terms and conditions of this company;" and he was declared to be held assured under these conditions until the policy was delivered.

The application, signed by the plaintiff, asks the defendants "to insure from loss by fire * * on the usual terms and conditions of your company."

The policy issued to plaintiff is dated 7th August, 1880, and on its face declares that the capital stock, &c., of the company shall according to the deed of settlement thereof (subject to the conditions endorsed thereon) be subject and liable to pay, &c., all loss and damage, &c., &c.

On the back of the policy appears a set of conditions headed: "Conditions within referred to, and on which this policy is granted." No other conditions appear.

The 11th condition declares "the insured shall not be permitted to abandon any property insured which shall be injured in consequence of fire, without the express consent of the company or its agent, but it shall be the duty of the insured by himself and his servants, or other persons in his employ, to at once do all in their power to save and protect the property, to prevent any further injury thereto."

Sec. 17. "The non-fulfilment of any one of these conditions or stipulations shall entail the forfeiture by the insured * * of all benefits under the policy."

This company appears always to have resisted the rights of the Ontario Legislature to impose conditions or fetter their liberty of contract in insurance matters, and their conditions have always appeared in the shape of those endorsed on this policy.

A protracted litigation on these points has finally resulted in the recent decisions of the Privy Council in *Parsons v. these defendants*, and *Parsons v. Citizens' Insurance Co.*

It is finally settled by the Privy Council that the statutory conditions are to be considered as part of every policy, and that any omissions from, additions to, and variations therefrom, must be printed, headed, and shewn as provided by the Ontario Statute.

The Revised Statutes of Ont. ch. 162, contain a set of conditions headed, "Statutory Conditions," and section three declares they shall be thereafter deemed to be part of every policy.

Section four declares that if the company desire to vary, or omit any of them, or add new conditions, there shall be added in conspicuous type and in different coloured ink, words to the following effect: "Variations in Conditions. This policy is issued on the above statutory conditions, with the following variations and additions."

Section five declares that no such variation or addition,

&c., shall, unless so distinctly indicated, be legal and binding on the insured.

The result is, that we must hold that this is a policy with the statutable conditions alone affecting the same.

According to the interim receipt here given, the Privy Council held that the company might "issue a policy with their own conditions, provided that care was taken to print the statutory conditions and show the variations from and additions to them, which their own conditions present, in the manner prescribed."

The statutory conditions have no provision resembling No. 11 in the defendants' conditions.

No. 5 declares that where property is only partially damaged no abandonment will be allowed, except by consent, and in case of removal to escape conflagration, the company will ratably contribute to the costs of salvage.

By No. 13, (c) the assured has to declare that the fire was not caused through his wilful act or neglect, procurement, means, or contrivance; and (e) a certificate that he has by misfortune, and without fraud or evil practice, sustained loss and damage, on the subject assured, to the amount certified.

By No. 15, any fraud or false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim.

In *Chandler v. Worcester Ins. Co.*, 3 Cush. Mass. R. 328, the head note is: "The assured, in a policy against fire, may be guilty of such gross misconduct, not amounting to a fraudulent intent to burn the building, as to preclude him from recovering for a loss of the same by fire." The defence was, disclaiming any charge of arson, that gross negligence, carelessness, and gross misconduct of plaintiff caused the loss.

The facts are not stated, and the decision was that there should be a new trial, as the Judge had refused to instruct the jury as above, and to receive evidence on which the rights of the parties could be determined.

Shaw, C. J., says: "The question is, whether there can

be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover."

He then suggests instances, such as the premises taking fire and the flame beginning to kindle in a small spot which a cup of water would put out, and the assured having water at hand, but neglecting to put it on. "This," he says, "is mere nonfeasance; yet no one would doubt that it is culpable negligence in violation of the maxim, *Sic utere tuo*, &c. To what extent such negligence must go, in order to amount to gross misconduct, it is difficult by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded on the consideration that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury."

"Gross negligence," as is said in *Goodman v. Harvey*, 4 A. & E. 876, "may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine."

Pipon v. Cope, 1 Camp. 434. A ship was insured "free from captures and seizures and the consequences of any attempt thereof." She was seized two or three times for smuggling committed by the crew. She was released each time on petition. While under seizure, she was run into and injured. The demand against the underwriters was made up of the sums given to procure these restitutions and costs of repairs.

Lord Ellenborough said: "This is a clear case of *crassa negligentia* on the part of the assured. It was the plaintiff's duty to have prevented these repeated acts of smuggling by the crew. By his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters are discharged. Nor can he recover for the repairs. The ship

being under seizure when she was run foul of, he had then ceased to have any property in her. If a vessel is seized *pro justâ causâ*, the property is immediately vested in the crown."

Bunyon on Fire Insurance, 106: "When a fire happens the assured is bound to do all in his power to save the property, and so to deal with the salvage that the least possible injury may eventually happen; *a fortiori*, he cannot be justified in standing by and relying for his protection upon his policy, suffering others to misuse the damaged goods. It speaks well for the good feeling usually displayed on such occasions that no case has been reported in which this question has arisen upon a fire assurance. It cannot, however, be doubted but that the rule which applies in marine assurance, in the case of abandonment, is here equally applicable." He refers to *Arnould*. See ed. of 1877. vol. 2, p. 939; see also *Harkley v. Provincial Insurance Co.*, 18 C. P. 351.

May on Insurance, 1st ed., sec. 411, p. 495: "But negligence which amounts to misconduct is not insured against. Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness, and unskilfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness an abuse of discretion under an indefinite law."

Referring to C. J. Shaw's remarks in *Chandler's Case*, (already cited,) that if a party insured standing by the fire, which, by throwing on it a cup of water, could be easily extinguished, it would be a case of misconduct which would avoid the policy, Mr. May observes: "The difference between this and designed destruction, by actually setting fire, is certainly hardly appreciable as affecting the intent of the assured, though ostensibly in one case there is a positive act, while in the other there is no action at all."

Phillips on Insurance, 5th ed., p. 631: "The assured

is not entitled to indemnity for negligence closely bordering upon fraud. The Supreme Courts of Massachusetts are of opinion that the underwriters are at least not liable for loss by fire occasioned by his extreme, reckless, and inexcusable negligence, the consequences of which must have been palpably obvious to him"—citing *Chandler's Case*, and Angell, sec. 129, *et seq.*

Angell, secs. 127, 128, 129 and 130, giving C. J. Shaw's judgment in *Chandler's Case*.

Sec. 128: "Gross negligence, if not fully equivalent to fraud, is inconsistent with good faith, unless in the case of an idiot; and insurance is not an indemnity for the want of common sense to discern where there is obvious danger of communicating fire by any particular act. * * * In marine insurance, if the negligence be so gross as to authorize the presumption of fraud, which would constitute barratry, the underwriters are not liable unless the policy expressly insures against barratry, or, in other words, fraud."

Sec. 133 points out that, on some American authority, negligence on the part of the assured from which a fire has arisen, may be of so gross, aggravated and reprehensible a character as to exonerate the underwriters, although not evidence of a deliberate intention to fire the premises, required to convict of arson.

Marshall on Insurance, 497, 5th ed. 1865: "In case of shipwreck or other misfortune, the effects saved continue, till abandoned, the property of the assured, who is bound in justice, honour, and conscience, to use his utmost endeavours to make the most of what may be rescued from destruction, in order as much as possible to lighten the burden of the insurers."

The doctrine as to the *causa causans*, and also as to the *causa sine qua non*, is much discussed in *Thompson v. Hopper*, 6 E. & B. 172, and in *Error*, E. B. & E. 1038. See also *Jameson v. Royal Assurance Co.*, 7 Ir. C. L. R. 126.

In *Wood* on Insurance, 223, section 101, it is said: "Negligence that excuses the insured must be wilful or

fraudulent; must be such as exhibits fraud or design; and mere negligence or misconduct, although gross, will not prevent a recovery." *Chandler's Case* is fully noticed. The writer, after calling attention to the fact that the illustration of Shaw, C. J., did not suggest that the insurer originally caused the fire, proceeds: "Yet he omitted to do that which good faith required that he should do, and which evidenced an intent on his part to permit the premises to burn when good faith and common honesty required that he should have used his best efforts to prevent the loss; and it is submitted that this is such conduct as would warrant the jury in finding a fraudulent purpose or design to defraud the insurers, which, within the rule would relieve them from liability * * Negligence on the part of the assured may be shewn as tending to establish fraud or design on his part, but not as of itself a legal excuse of the liability of the insured."

In *Gove v. Farmers' Insurance Co.*, 48 New Hamp. 43, it is said: "It would be fair to infer a fraudulent intent in the insured, as would be indicated in a forbearance to use all reasonable exertions to save his property from the ravages of fire, when ample preventative means and ability are at hand. Evidence of this kind will tend to discharge underwriters and insurers from their liability in case of loss."

In *Huckins v. People's Insurance Company*, 31 New Hamp. 238, 248, *Chandler's case* is noticed. The Court say: "The cases put by the distinguished Chief Justice would, according to the civil law, be of themselves proof of fraud or equivalent to fraudulent purpose or design. They are indeed supposable; but from such facts a jury would be very likely to find intentional fraud. Although such negligence consists in doing nothing and may therefore be a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness differing little in character from a fraudulent and criminal purpose, to commit such injury."

The contract of insurance is essentially one of indemnity. The insurer undertakes to pay up to a certain amount the

loss to be sustained by plaintiff. It is a contract requiring the utmost good faith between the parties.

The loss or damage to be made good must, I consider, be such as will happen in the ordinary course of things—loss reasonably unpreventible as far as the assured is presumably concerned—not loss wilfully caused or incurred by him.

Every contract must, I assume, contain an implied condition that neither party will do anything to prevent the other from performing his part. In like manner I assume that an agreement to indemnify another from a named contingency carries with it the provision that the person to be protected shall neither wilfully cause a loss or purposely increase or inflame it by wilfully refraining from the exercise of such obvious, easy, and ordinary exertion as may be always reasonably expected from a person willing to act honestly towards him to whom he looks for indemnity. When a man proposes to insure his goods with a company, it becomes of course an inevitable consideration with the latter in deciding on the risk, the nature of the goods, their situation, the danger to them if a fire break out, the facilities or difficulties in the way of saving them, and the possible nearness or distance of assistance, such as fire engines, &c., or the aid of neighbours to extinguish or check the fire or to save the goods.

I am of opinion that if the assured wilfully prevent the interference of others to save the goods which would otherwise be destroyed, or the working of fire engines, &c., to extinguish the fire, preferring to see them destroyed, in reliance on his insurance, he thereby commits a fraud on the insurers which releases them from their contract.

Where he wilfully refrains from and neglects to save the insured property, having no reasonable excuse therefor, and having ample means at his disposal so to do, I think a like rule should apply.

If a man have an insurance on valuable jewellery kept in a small box, of light weight and readily portable, if he see the house in which he and they are on fire, and he wilfully and intentionally leaves the box to be consumed, when

he could have readily removed it, preferring to rely on his insurance, the mind naturally revolts from such conduct, as evidencing a dishonest mind and a fraudulent disregard of the rights of others.

Can it be said in such a case that this was a loss to which the promised indemnity could properly apply ?

The statutory declaration as to the loss, as made by plaintiff, avers that a fire occurred by which property insured sustained loss and damage to \$2,300; and that the fire was from some cause unknown, and it was neither by his wilful act, neglect, procurement, or connivance; and that the claim and papers attached were exact and true in every particular.

Under the statutory conditions, as already pointed out, the assured, if required, is to furnish a certificate that he has by misfortune and *without fraud or evil practice* sustained loss and damage.

His statutory declaration is to state that his account is just and true, and any fraud or false statement therein shall vitiate the claim.

The proof papers were of course sent in under the company's, and not under the statutory conditions.

It was urged on the argument that, in any event, the evidence only went to shew that a small portion of the goods were prevented from being saved by any wilful conduct of plaintiff. It seems to me at present that if the result of plaintiff's conduct be that a fraud was thereby committed on the defendants, the insurers, such a fraud would have a larger effect, and may go to the invalidating of the whole claim.

The second plea states directly as a defence, without reference to any condition or provision in the policy, that the plaintiff wilfully neglected to save and unlawfully prevented others from saving the property, but for which wilful and unlawful act the property or any part of it would not have been destroyed.

I am not prepared to hold that such a plea does not disclose a bar to the claim irrespective of any condition.

The third plea rests on a condition which it must now be held does not exist.

The jury could not agree on the plea as to fraudulent overvaluation. They considered a substantial portion of the goods might have been saved.

It appears to me that our proper course is, to let the parties again proceed to trial, as on a policy with the statutory conditions only, making the necessary alterations in the pleadings, and with leave to amend pleadings.

It must be understood that by wilful neglect to save, or preventing others from saving the insured property, we understand its being done with the fraudulent intention and purpose of throwing the loss on the insurers, and the plea should state it as done with such intent and purpose.

ARMOUR and CAMERON, JJ., concurred.

Rule absolute for new trial, without costs.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

FROM FEBRUARY 7, 1881, TO FEBRUARY 18, 1882.

AMENDMENT.

See SALE OF GOODS, 1—INSURANCE, 2,

APPEAL.

Appeal from Single Court Judge.]—Where a Judge in Single Court had, before the Judicature Act, decided applications to quash a by-law and to set-off judgments, *Held*, that under the Act there could be no appeal to a Divisional Court. *In re Galerno and the Corporation of the Township of Rochester, et al.*, 379.

From award under consent order at Nisi Prius.]—*See* ARBITRATION, 2.

To Sessions from magistrate's conviction for breach of municipal by-law, chairman may grant or refuse jury under 36 Vic. ch. 58, sec. 2.]—*See* SESSIONS, 2.

See CONVICTION, 1.

ARBITRATION.

1. *Arbitration*.—*Oaths of witnesses dispensed with.*]—*Held*, that under

R. S. O. ch. 50, sec. 224, the witnesses on an arbitration must be examined upon oath, unless there is a positive agreement or consent to the contrary. Such consent or agreement may be shewn *dehors* the submission, and in this case, upon the affidavits filed, it was held to be sufficiently made out; but

Semble, that it cannot be inferred from the absence of objection or mere acquiescence. *In re Rushbrook and Starr*, 73.

2. *Consent reference*.—*Award*.—*Appeal*.—R. S. O. ch. 50, sec. 205—*Contract*.—*Repudiation*.—*Delay*.—*Measure of damages.*]—An appeal lies from an award made in pursuance of a consent order of reference in a cause at *Nisi Prius* under sec. 295 of the C. L. P. Act.

On the 3rd October, the plaintiff chartered the defendant's vessel, the "Erie Belle," to carry salt from Goderich to Milwaukee, for 75 cents a ton, the effect of the contract being, that the vessel was to load and carry within a reasonable time. On the

11th October defendant telegraphed, "Erie Bell" cannot go, will you take Steam Barge as substitute, answer quick?" Some subsequent correspondence took place, the plaintiff holding the defendant to his contract, and the defendant agreeing to perform it. At this time the plaintiff could have got a vessel at \$1.00, but waited for the defendant's vessel, which was loaded on the 25th November, when the master, fearing bad weather, refused to sail, and it was impossible to charter another vessel. The plaintiff, who had sold the salt in Milwaukee, sent part by rail, and paid his consignee the difference in price between salt which he had to buy and the contract price. The freight by rail was \$3.50 per ton, and 50 cents had to be paid for cartage which would have been unnecessary had the salt gone by defendant's vessel.

Held, on appeal from the arbitrator, that the defendant was not entitled to hold the plaintiff to the damages which he might have recovered had he chartered a vessel at \$1.00 after the telegram of the 11th October, for that telegram, taken in connection with the subsequent correspondence, did not shew an absolute refusal to perform the contract on which the plaintiff was bound to act; but that the plaintiff was entitled to recover the difference in price paid to his consignee, the difference in the freight, and the amount paid for cartage. *McEwan v. McLeod*, 235.

3. *Award—Arbitrator or umpire—Tenure—of municipal officers—Dismissal.*—Municipal officers appointed by the council hold office during the pleasure of the council, and may be removed without notice and without cause.

To an action for wrongful dismis-

sal, and on the common counts, defendants pleaded an award, by which all matters in dispute between the parties had been settled. The submission was to S. and N., and such third person as "the said arbitrators" should appoint, "so that the said arbitrators or umpire" make his or their award * * by, &c., or such further day as "the arbitrators, or any two of them," might enlarge to. Before entering upon their duties, S. and N. appointed E. as third arbitrator, and the award was executed by S. and E. only, but professed, in the body of it, to be the award of the three.

Held, that E. was a third arbitrator, not an umpire; that the word "umpire," in the submission, must be rejected as surplusage; and the award was invalid, not having been made by all three arbitrators. *Wilson York (a)* 289.

4. *Arbitration—Submission.*—By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forgo all rights to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost.

Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works, that E. was not an arbitrator; and that

the agreement could not be made a rule of Court as a submission to arbitration. *In Re Langman and Martin et al.*, 569.

See MUNICIPAL CORPORATIONS, 4, 6.

ARREST.

Capias—*Issue of before writ of summons.*]—Notwithstanding the Judicature Act, sec. 90 and rule 5, a writ of *capias* may still be issued under R. S. O. ch. 67, and the C. L. P. Act before an action has been commenced by a writ of summons. *Vetter v. Cowan*, 435.

(This case has been set down for argument in Appeal.)

ASSAULT.

On indictment for, occasioning actual bodily harm, defendant not competent witness on his own behalf under 43 Vic. ch. 37, D.]—See CRIMINAL LAW, 1.

See CONVICTION, 3.

ASSESSMENT AND TAXES.

Village—*Statute labour.*]—There is no liability to perform statute labour in a village municipality, and a by-law providing for its commutation was held *ultra vires* and void, and was quashed. *In re Stayner et al.*, 275.

ATTACHMENT.

Obstructing sheriff—*Conviction under 32-33 Vict. ch. 32.*]—The sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendant, who rescued the goods. On complaint of the sheriff's officer, they were summarily tried before a

Police Magistrate and fined, under 32-33 Vict. ch. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs. *Haywood et al. v. Hay et al.*, 562:

BANKRUPTCY AND INSOLVENCY.

Insolvent Act of 1875—*Composition deed*—*Validity*—*Joint and separate creditors.*]—Action of debt by the plaintiff claiming under a deed of composition and discharge, as assignee of the assignee in insolvency of a co-partnership, whereby the debt in question was assigned to him. Plea, setting out the deed, whereby the plaintiff covenanted with all the creditors, collectively and severally, to pay them and each of them 50c. on the \$ of their respective claims against the said insolvent firm, and on confirmation of the deed to pay the costs respecting the insolvent firm's estate * * and the preferential claims against the said firm, in consideration of which "the said creditors" released to the insolvents their claims against them, and directed a conveyance of the insolvent firm's estate to them, and plaintiff averring that at the time of the assignment of the debt to the plaintiff there were separate debts of the insolvents, or one of them, unpaid and unsatisfied, which were not provided for by the deed.

Held, that the deed provided for the payment of firm creditors only, and did not include separate creditors, and therefore that the plaintiff's

title to the debt failed. *McKitrick v. Haley*, 246.

BANKS.

Note given to bank for collection—Branches of bank, how far distinct—Neglect to give notice to endorser—Liability.—The plaintiff, a customer of the defendants' branch bank at Chatham, handed to the manager there for collection a note made by G. C. to and endorsed by T. C., both of whom lived at Detroit, where the note was made and payable. The Chatham branch stamped above the endorsement of T. C. a special endorsement to themselves, but the Chatham manager without endorsing the note sent it to their Windsor branch for collection—Windsor being their nearest branch for Detroit—without any instructions as to the place of residence of the endorser, who, however, was well known in Detroit. The manager of the Windsor branch endorsed it to the cashier of the First National Bank, their agent there, and sent it to him for collection. Payment having been refused upon presentation they handed it to a notary, who duly protested it, but enclosed the notice for T. C., the endorser, in the envelope containing the notice to the Windsor branch, addressed to the manager of that branch. A clerk in the Windsor branch sent the notice for T. C. to the Chatham branch, which was duly posted at Windsor, but was never received from the Chatham post office, and T. C., the endorser, never received any notice. The Chatham manager received the protest by due course of mail, and could have seen from it in time to rectify the mistake that the notice for T. C. had been addressed to the Windsor agent. The

endorser having been sued in Detroit escaped on the ground of want of notice, and, the maker being worthless, the payee sued defendants for neglect with regard to such notice. It appeared that in Detroit it was the custom for the notary to send notices for the endorser to the bank from which the note was received. It was contended that the branches were for this purpose distinct: that the notice was properly sent to Windsor, and thence to the Chatham branch, whence the note came; and that but for the neglect of the P. O. the notice would have been duly received at Chatham and sent to the endorser. But

Held, that the defendants were liable: that on sending the note to their Windsor agent they should have given proper information as to the residence of the endorser for the guidance of the notary; and that the Chatham branch having notice from the protest, which they should have examined, that the notice for the endorser had been sent to Windsor, they should at once have had a proper notice served in Detroit, which they could have done in time. *Steinhoff v. The Merchants' Bank*, 25.

See PRINCIPAL AND SURETY.

BILLS AND NOTES.

Promissory note—Notice of dishonour—Sufficiency of.—A notary at Montreal, Quebec, protested a note upon which the defendant, an attorney practising at Belleville, Ontario, was endorser. The notary could not read the defendant's signature, but made an imitation of it upon the notices and in the superscription of the letter which was addressed to "Belleville P. O.," *i. e.*,

Province of Ontario. The defendant was well known at, and constantly received letters from the Belleville Post Office. There was proved to be a Belleville in New Brunswick. Other notes, with defendant's endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his letters from the post office, were not called. The notice to another endorser, addressed to "Belleville P. O.," was received by him.

Held, (CAMERON, J., dissenting), that if the imitation of the defendant's signature put upon the notice addressed to Belleville was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not. But

Held, (ARMOUR, J., dissenting), that, upon the facts in evidence, there should be a new trial.

Per ARMOUR, J.—The Court were justified in inferring that the imitation of defendant's signature in the address was as good as the imitation of it in the protest, and that if it came to the Belleville post office so addressed it would have been delivered to him; and the plaintiff was entitled to the verdict.

Per CAMERON, J.—The illegibility of the address made the notice insufficient. *Baillie v. Dickson*, 167.

(This case has been set down for argument in Appeal.)

See BANKS—PRINCIPAL AND SURETY.

BILLS OF SALE & CHATTEL MORTGAGES.

1. *Chattel mortgage—Refiling.*—The plaintiff held a chattel mortgage made by one G., which was dated

9th May, 1879, and filed 13th May. Defendants' mortgage from the same mortgagor was dated in the December following. On the 12th April, 1880, the plaintiff made affidavit of the amount due up to the 10th April, and refiled the mortgages under the R. S. O. ch. 119, sec. 10. The defendants were landlords of the mortgagor and illegally distrained for rent, whereupon the plaintiff brought trover for goods levied upon by them and contained in his mortgage.

Held, that the defendants were neither creditors nor subsequent purchasers or mortgagees within the statute, and therefore could not object to the mortgage because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year.

Semble, that such affidavit and statement should be made within the thirty days. *Griffin v. McKenzie, et ux*, 93.

2. *Chattel mortgage—Statement of consideration—Growing crops—Registration—Affidavit.*—The affidavit of *bona fides* in a chattel mortgage purported to be sworn before "T. B. F.," without any addition. The affidavit of execution was sworn before the same commissioner, his name being followed by the words, "A Commissioner in B. R., &c."

Held, no objection to the affidavit of *bona fides*.

The consideration in the mortgage was stated as \$1,148; but it appeared in evidence that the amount actually owing was only \$1,030.80.

The learned Judge at the trial nonsuited the plaintiff, on the ground that the consideration was not truly stated, and that the mortgage was therefore void as against the defendant, an execution creditor."

Held, (ARMOUR, J., dissenting), that the nonsuit was wrong, for the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but as a circumstance for the jury to consider when deciding the issue of fraud or no fraud.

The mortgage covered growing crops.

Held, (ARMOUR, J., dissenting), that such crops being incapable of delivery or change of possession, without change of occupation of the land, the mortgage as to them was not within the Chattel Mortgage Act. *Hamilton v. Harrison*, 127.

BUILDING CONTRACT.

See ARBITRATION, 4.

BY-LAW.

Must be reasonably clear and unequivocal in language in order to alter or vary the common law.]—See DISTRESS, 2.

Sufficient publication of.]—See MUNICIPAL CORPORATIONS, 5.

See PUBLIC SCHOOLS.

BOUNDARY.

See LIMITATIONS (STATUTE OF), 3.

CERTIORARI.

Allowance of — Quashing.]—Where the recognizance to prosecute a *certiorari*, returned after allowance of the latter by the convicting justices, together with the conviction, is substantially and clearly

bad, and the conviction may possibly be upheld, the allowance of the *certiorari* may be quashed on the return of the rule *nisi* to quash the conviction, without a substantive motion for that purpose; but otherwise, where the objection is a trivial one, or the conviction is clearly defective and must inevitably be quashed. *Regina v. Cluff*, 565.

Will not lie to remove conviction under R. S. O. ch. 181, sec. 48, which has been amended in Appeal to Sessions.]—See SESSIONS, 1.

Not taken away by R. S. O. ch. 74, where conviction is for breach of a by-law.]—See SESSIONS, 2.

See CONVICTION, 2.

COMMISSION.

To try charges against County Judge.]—See COUNTY JUDGE.

CONTEMPT.

See ATTACHMENT.

CONSTITUTIONAL LAW.

1. *Hard labour—Power of Provincial Legislature to impose.*]—The power to imprison only does not include the power to impose hard labour as well; and the Ontario Legislature therefore cannot, under the B. N. A. Act, sec 92, add hard labour to imprisonment. *Regina v. Frawley*, 153.

2. *Private Act—Effect of—Jurisdiction of Local Legislatures—Domicile of party affected—Pleading.*]—The plaintiff, being the holder of a debenture issued by the B. & O. R. W. Co under 23 Vict. ch. 109, sued thereon. By the 27 Vict. ch. 57,

the railway company were authorized to issue preferential bonds, and to execute a mortgage to a trustee to secure payment thereof. The railway, being at the time of Confederation a local work, the 31 Vict. ch. 44 (O.), was passed, which recited that the trustee was in possession and about to foreclose the mortgage, and, amongst other things, directed that the debentures (therein called ordinary bonds) should be converted into stock at a certain rate on the dollar; and that the holders thereof should have no other claim on the company than for conversion of their debentures into stock. By the 41 Vict. ch. 36 (D.), the B. & O. R. W. Co. and the defendant company were amalgamated. The defendants set up that their liability on the debentures in question was extinguished by the 31 Vict. ch. 44 (O.), and that they were ready and willing to take the debentures in exchange for reduced stock thereunder. Third replication, that the Act was *ultra vires*, because the debenture was payable in London, England, and was there domiciliated, and the holder resided there at the time of the passing of the Act, beyond the jurisdiction of the Ontario Legislature.

Held, on demurrer, third replication bad; for, though the Ontario Act was in the nature of a Private Act, it sufficiently referred to the plaintiff by referring to the class of bondholders to which he belonged, and that he was therefore bound thereby.

Held, also, fourth replication bad, for the Local Legislatures were not restricted by the decree "Property and civil rights in the Province" to legislation respecting bonds held therein, and that where debts or other obligations are authorized to

be contracted under a local Act, passed in relation to a matter within the power of the Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province. *Jones v. The Canada Central R. W. Co.*, 250.

See TAVERNS AND SHOPS, 1—
COUNTY JUDGE.

CONTRACT.

See SALE OF GOODS, 3—FRAUD.

CONVICTION.

1. *Memorandum of Conviction—Appeal to Sessions—Return of conviction after verdict—Mandamus.*]—A conviction must be under seal. A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the General Sessions, or, in the discretion of the Chairman, even during an adjournment for judgment.

A minute of conviction signed by the Justice, but not sealed, was returned to the Sessions upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The Chairman reserved judgment until a day named, and during the adjournment the Justices returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard.

Held, that the prosecutor was not

entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was in the Chairman's discretion, which could not be reviewed. *In re Ryer and Plows*, 206.

2. *Certiorari* — *Jurisdiction of Superior Court.*]—On an application to quash a conviction brought up upon *certiorari*, the Court will not notice any facts not appearing in the conviction, for the purpose of impeaching it on any ground, except want of jurisdiction; nor has the Court any power to review the decision of the Sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal.

The Court refused, therefore, to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground, among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina v. Grainger*, 382.

3. *Regularity*—*Request to proceed summarily* — *Distress* — *Estoppel.*] The defendant was convicted of a common assault, upon the complaint of the prosecutor, who verbally requested the magistrate to proceed summarily. *Held*, that the request to proceed summarily need not be in writing.

The conviction adjudged payment of a fine and costs, and in default imprisonment. *Held*, good; and that it was not necessary to order that a distress warrant to compel payment of the fine should be issued before imprisonment.

Held, also, (1) that the fact that the memorandum of conviction differed from the conviction as re-

turned, in not providing for imprisonment in default of payment, did not invalidate the conviction, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up; (2) the defendant, having had the *certiorari* directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them. *Regina v. Smith*, 442.

See TAVERNS AND SHOPS, 1, 2—SESSIONS, 1, 2—ATTACHMENT.

CORPORATIONS.

Calls on stock—*Allotment*—*Vesting of shares.*]—Claim: Calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: By a by-law of the plaintiff company no subscribers of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made.

Held, on demurrer, bad: for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vic. ch. 93, sec. 2, (O.) the plaintiff company's Act of incorporation. *The Union Fire Insurance Com. v. Lyman*, 453.

COSTS.

Not asked for in rule, though they were at the bar, held no objection, as

they are in the discretion of Court under Judicature Act.]—See DEDICATION.

See RULES OF COURT.

COUNTY JUDGE.

*Charges of misconduct—Enquiry by commission—Court of Impeachment.]—*Certain charges having been preferred against a County Court Judge, a commission was issued under the Great Seal of Canada, reciting these facts and the provisions of 22 Geo. III. ch. 75, (Imp.) and directing the commissioners to examine into the charges, and for that purpose to summon witnesses, and require them to give evidence on oath and produce papers; and to report thereupon. The enquiry proceeded, and a motion was made for a prohibition.

Held, that enquiries under the Imperial Aat should be made before the Governor-General in Council, and the authority could not be delegated, nor enquiry upon oath authorized by commission.

Held, also, that the commission could not be supported at common law, for it created a Court for hearing and enquiring into offences without determining.

The C. S. C. ch. 13, and 31 Vic. ch. 38 (D.), give power to issue commissions for enquiring into the administration of justice when the enquiry is not regulated by any special law, and an enquiry into the conduct of any one connected with the administration of justice is within the meaning thereof. But

Held, that this enquiry into the conduct of a County Court Judge falls within the exception in the Act, being regulated by C. S. U. C. ch.

14, secs. 1 and 4, which are a special law for such cases.

The 32 Vic. ch. 22, sec. 2 (O.); 32 Vic. ch. 26 (O.); 33 Vic. ch. 12, sec. 1 (O.), and R. S. O. ch. 42, sec. 2, assuming to repeal C. S. U. C. ch. 14, and C. S. U. C. ch. 15, sec. 3, and to abolish the Court of Impeachment for the trial of County Court Judges, and regulate their tenure of office are *ultra vires* the Provincial Legislature. The tenure of office of the County Court Judges is still regulated by C. S. U. C. ch. 15, sec. 3.

The different modes of proceeding against County Court Judges for misconduct pointed out. *Re Squier*, 474.

Jurisdiction of, to set aside quo warranto.]—See MUNICIPAL CORPORATIONS, 9.

COURT OF IMPEACHMENT.

See COUNTY JUDGE.

CRIMINAL LAW.

*Criminal law—Assault occasioning actual bodily harm—Evidence—Competency of defendant on his own behalf.]—*On an indictment for assault and battery occasioning actual bodily harm. *Held*, that the defendant is not a competent witness on his own behalf under 43 Vic. ch. 37, D. *Regina v. Richardson*, 375.

2. *Indecent assault—Evidence of subsequent conduct—Admissibility of.]—*Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault, evidence was tendered of the

conduct of the prisoner towards her subsequent to the assault.

Held, that the evidence was admissible as tending to shew the indecent quality of the assault, and as being in effect a part or continuation of the same transaction as that with which the prisoner was charged.

Per HAGARTY, C. J., and ARMOUR, J.—The evidence was properly admissible as evidence in chief. *Regina v. Chute*, 555.

CROPS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2—MORTGAGE, 1—HUSBAND AND WIFE.

DEDICATION.

Dedication of public square—Powers of municipality to close—By-law not in public interest—Municipal Act, ss. 467 and 509—Costs]—A municipal corporation laying out a square or park, on lands acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by section 509 of the Municipal Act, R. S. O. ch. 174, at least where no private rights have been acquired in consequence of their action; but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated.

The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from any erection or obstruction :"

Held, that the municipality had no power to close up part thereof, and dispose of it to trustees of a church.

The by-law for this purpose contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not take effect till the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it.

Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class.

Held, also, that the applicant was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage.

Costs were not asked for in the rule, though they were at bar : *Held*, that as costs are in the discretion of the Court under the Judicature Act, this was no objection. *In re Peck and the Town of Galt*, 211.

DEED.

Ejectment—Reservation of certain quantity of land from conveyance—Time of selection]—Defendant conveyed to his son J. L., jun., the east half of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the lands hereby conveyed, where the said parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death, J. L.,

jun., built a small house on the land, which was occupied by his men till his death. After his son's death the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in the deed from J. L., sen., (the defendant.) to J. L. jun."

Held, that the reservation in the deed from the defendant to his son was more properly an exception than a reservation: that an estate for the joint lives of the defendant and his wife, and for the life of the survivor, remained in the defendant; and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son.
Burnham v. Ramsey, 32 U. C. R. 49, distinguished.

The estate in question had been conveyed to G. D. & L. P., between whom a partition had been made, *not under seal*, giving to L. P. the east half. Afterwards G. D. conveyed to the defendant his interest in the east half, and after the execution of the deed by the defendant to his son, L. P. by deed, reciting that by oversight there was no release from him of the east half, and that he was desirous of completing the son's title, released the east half to the son.

It was contended that the defendant owned only an undivided moiety of the lot when he conveyed to his

son, and that the plaintiff, claiming through the son, could recover an undivided moiety of the acre selected by the defendant; but *Held*, otherwise, for the plaintiff took his deed subject to the reservation in the defendant's deed to his son, and the deed from L. P. to the son would enure only to the benefit of the title conveyed to him by his father.
Lapointe v. Lafleur, 16.

DEFAMATION.

Libel — Privilege — License Commissioners' resolution ultra vires.]—

Claim: That the defendant, an Inspector of Licenses, falsely and maliciously published of the plaintiff a circular which he caused to be sent to all licensed victuallers. &c., in the Riding, containing the following words: "W. R. (and others) are in the habit of drinking intoxicating liquors to excess, and you are hereby notified that you are not to sell, give, &c., intoxicating liquors to the said parties, or to the wife, husband, child, employee, agent, or any member of the family or household of the said parties." Defence: That the Commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, &c, to any person who has the habit of drinking intoxicating liquors to excess, or the wife, &c., of such person, or any person concerning whom notice had been given to the landlord by the husband, &c., of such person, or any Justice of the Peace or Inspector, that such person is in the habit of drinking." &c.: that the licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending

them for breach of the resolution. And the defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution.

Held, on demurrer, that the License Commissioners had no power to pass the resolution, and therefore that the defence was bad, for the communication was not privileged, and the defendant's belief in the validity of the resolution could not create any privilege. *Roberts v. Clime*, 264.

DEMURRER.

See INSURANCE, 2.

DISTRESS.

1. *Distress—Exemption of goods in the way of trade.*—The exemption from distress of goods entrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded on public policy for the benefit of trade.

In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by defendant.

Held, that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber; and that the plaintiff was entitled to recover, notwithstanding that one of the tenants of the saw-mill appeared to have an interest with him in the saw-logs. *Patterson v. Thompson*, 7.

2. *Cattle running at large—Impounding—Distress—By law.*—A by-law must be reasonably clear and

unequivocal in its language in order to vary or alter the common law.

A municipal council by by-law, passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township; and provided for fixing the height of fences. The plaintiffs' cattle strayed from the highway into the lands of defendant Williams, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant Steeper being the pound-keeper. In an action of replevin,

Held, that as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O., ch. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Crowe v. Steeper et al.*, 87.

See MORTGAGE, 1—CONVICTION, 3.

DRAINS.

See MUNICIPAL CORPORATIONS, 5, 7.

ELECTIONS.

See MUNICIPAL CORPORATIONS, 3.

ESTATE.

See DEED—LIMITATIONS (STATUTE OF) 1—LANDLORD AND TENANT, 2.

ESTOPPEL.

See CONVICTION, 3.

EVIDENCE.

See CRIMINAL LAW, 1, 2.

EXCEPTION.

See DEED—LANDLORD AND TENANT, 2.

EXEMPTION

Of goods in way of trade, from distress.—See DISTRESS, 1.

FIXTURES.

See INSURANCE, 1—MORTGAGEE, 3.

FRAUD.

Contract—Fraud—Rescission.—The plaintiff in 1873 sold to defendant certain timber limits and chattel property for \$85,000, payable in eight yearly instalments, with many special terms as to advances to be made by plaintiff to defendant to assist him in getting out lumber thereon, commission to be paid by defendant to plaintiff, &c. By deed in 1878, reciting that defendant had been unable to carry out this agreement, it was agreed that in consideration of defendant being released from all obligations to defendant except as set out in a deed of composition of the same date, the said agreement should be cancelled.

By the composition deed, between the plaintiff and his creditors, to which defendant was a party, the creditors agreed to accept 25 cts. in the \$1, on their respective claims, which was to be paid in part out of the proceeds of a raft belonging to defendant, then on its way to Que-

bec, and the balance in three years; and certain lands were assigned as security. To enable defendant to transport his said timber to market, the plaintiff agreed to advance the necessary funds, for which he was to have a preferential claim on the proceeds. The unpaid balance due by one J., under an agreement made by the plaintiff, was to be deducted from the full and not from the reduced amount due to the plaintiff; and in fixing the amount due to the plaintiff, \$30,000 was to be deducted for the retrocession of the limits, which the plaintiff had agreed to sell to defendant by the cancelled agreement.

It appeared that the defendant in 1878, representing himself to be unable to meet his engagements, and to be largely indebted to one E., among others, and owing the plaintiff about \$80,000, had called a meeting of his creditors, the result of which was the composition deed mentioned and the agreement of the same date with the plaintiff.

The plaintiff had taken possession of the property so taken back by him, and had received the advances made by him to enable defendant to get down the raft, and part of the money money due by J. He had never offered back to defendant such property or money, nor offered to release the security, and E., with defendant's other creditors, had been paid in full. Having discovered that there was no debt due by the plaintiff to E., the plaintiff sued on his agreement of 1873.

Held, (ARMOUR, J., dissenting,) that the whole transaction evidenced by the two deeds in 1878, must be regarded as one arrangement: that the plaintiff could not be treated as a creditor who had received part of his

claim, and been induced by fraud to release the residue: that, he could not repudiate the release for fraud, not being in a position or having offered to repudiate the whole arrangement; and that his proper remedy was an action for the damages caused by defendant's deceit.

Per ARMOUR, J.—The composition having been obtained by fraud, the plaintiff was entitled to sue for the balance of his debt, crediting the agreed price of the property and money received to the defendant. *Frazer v. McLean*, 302.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

GUARANTEE.

Advance by guarantor before default.—The defendant guaranteed the due payment by G. to the plaintiffs at maturity of two promissory notes of \$751 each, to the extent of \$751. On the day the first note matured G. was unable to pay it in full, and defendant gave him his note for the requisite amount, which he discounted and applied the proceeds thereof to the payment of the note at a bank where it lay for collection. As between defendant and G. it was intended that the proceeds should go in relief *pro tanto* of defendant's guarantee, but neither the plaintiffs nor the bank had notice of this, and there was no such specific appropriation.

Held, that the advance by defendant to G. before default in payment to the plaintiffs, and therefore before defendant had become liable, was not a payment in satisfaction of plaintiffs' liability by virtue of the guaranty, which remained unaffected thereby. *Crathern et al. v. Bell*, 365.

HARD LABOUR.

See CONSTITUTIONAL LAW, 1.

HUSBAND AND WIFE.

Married woman—Right to crops on land owned by her—Separate occupation—R. S. O. ch. 127.—The plaintiff, a married woman, who had been married in 1864, lived on a 200 acre lot with her husband and children. The land had belonged to her husband's father, who died in 1874, having devised the east-half to the plaintiff's son, a minor, and the west half to the plaintiff, there being then a judgment against the husband, which it was supposed was the testator's reason for such devise. The whole farm had been occupied and farmed together, the plaintiff being under the impression that she was entitled to the son's half until he came of age. The husband did some little work about the place, but it was generally known and understood by those who worked upon the farm, as well as by the public, that the place was hers and how it had been left to her. The crops having been seized under an execution issued upon the judgment above mentioned, *held*, on an interpleader issue:

1. That the wife was not carrying on any occupation or trade separate from her husband, nor were these crops her wages or earnings, within sec. 7 of the Married Woman's Property Act, R. S. O. ch. 125.

2. That she was entitled to such crops as owner of the land, for the husband could not be said to be working the farm as head of the family, and the case was distinguishable, therefore from *Lett v. Commercial Bank*, 24 U. C. R. 562.

3. That the crops on both halves of the lot must be treated in the same way, the whole being managed in all respects as one farm. *Ingram v. Taylor*, 52.

IMPRISONMENT.

See CONSTITUTIONAL LAW, 1.

INDECENT ASSAULT.

Evidence of subsequent conduct.—*See* CRIMINAL LAW, 2.

INSURANCE.

1. *Misrepresentation—Incumbrances—Fixtures—Waiver—Divisible contract.*—The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense, built a dwelling-house for his own use, on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee;" and to the question—"Encumbered or not?" If yea, to what amount—how much land does incumbrance cover, and for what purpose erected?" he answered, "None." But he stated to the agent that there

was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition on the policy that the incumbrance should be disclosed, and that the failure to do so would avoid the policy. The verdict was for the plaintiff.

Held, (ARMOUR, J., dissenting) that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal.

Per CAMERON, J., that the house was a fixture and subject to the mortgage.

The condition was, that in case of any misrepresentation or omission to communicate any material circumstance, the insurance should be of no force "in respect to the property in regard to which the misrepresentation or omission is made."

Per CAMERON, J.—The policy was avoided only as to the insurance on the house.

The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution.

Held, that the defendants had not by the resolution waived their right to set up the defence.

Per ARMOUR, J.—The house was a chattel, and there was nothing in the application to estop the plaintiff from asserting that it was not insured as part of the land. *Phillips v. The Grand River Farmers' Mutual Fire Insurance Co.*, 334.

2. *Insurance company—Action for calls—Suspension of license—Business of insurance—Demurrer.*—Statement: Call on stock. Defence: That by an order of the Lieutenant-Governor of Ontario in Council, issued under 42 Vic. ch. 25, the

plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario; and that the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario.

Held, on demurrer, that the defence should have alleged notice in the *Gazette* of the suspension of the license, pursuant to R. S. O. ch. 160, sec. 34, and 42 Vic. ch. 25, sec. 3, sub-sec. 7; but an amendment was allowed, this point not having been taken, and, *Held*, that the defence was good, for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts. *Union Fire Insurance Co. v. Lyman*, 471.

3. *Fire Insurance — Omission of statutory conditions—Wilful neglect of insured to save property—Liability of company thereupon.*—Action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the 11th of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the 17th condition the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent over-valuation.

Held, that under the late decision of the Privy Council in *Parsons v. Citizen's Ins. Co.*, the policy must be taken to be a policy within the statutory conditions only; and a new trial was granted in order that the

case might proceed as upon such a policy.

Semble, however, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property. *Devlin v. The Queen Insurance Co.*, 111.

JUDICATURE ACT.

See APPEAL—ARREST—PLEADING—CORPORATIONS—JUDGMENT.

JUDGMENT.

Judgment before appearance — Jurisdiction of Judge — Rule 324.—A Judge sitting in Chambers has no jurisdiction to order judgment to be signed under Rule 324 (a), but a motion for judgment thereunder must be made to the Court. *Morrison v. Taylor*, 492.

LANDLORD AND TENANT.

1. *Lease—Proviso for termination —Negative and affirmative covenants —Overholding Tenant's Act.*—The defendant leased from the plaintiff the "refreshment room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment room," and that if he should fail, refuse, or neglect to carry out the terms of the lease, then that the lessee should, if required by the lessor, quit, leave, and absolutely

vacate the premises, and the lease should terminate." The learned Judge of the County Court of York found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession under the Overholding Tenant's Act, R. S. O. ch. 137.

Held, affirming the decision, that the sale was a contravention of the lease: that the proviso for termination of the same extended to negative covenants; and that the lease was therefore forfeited, and a right of entry accrued to the lessor, and that it was a case coming within the Overholding Tenant's Act. *Longhi v. Sanson*, 446.

2. *Ejectment—Lease for life—Construction of—Exception in grant.*—R. G., being seised in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard and dwelling house, after the decease of his beloved wife, J. G.," to hold to his daughter for and during their lives, or the life of the survivor of them, at the yearly rent of 20c., if demanded. Ten days afterwards he conveyed in fee to his son W. G., the land of which the three acres formed part, the son having actual notice of the agreement between his sisters and R. G. Subsequently W. G. conveyed to the plaintiff, "subject to the right of [R. G.'s wife and daughters] to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to a mortgage, which the plaintiff agreed to pay off. To this deed the plaintiff was an executing party. The plaintiff brought ejectment against R. G.'s daughters for the three acres.

Held, that the agreement by which R. G. intended to demise the three acres created a term at once, the wife of R. G. retaining the right to occupy during her life.

Held, also, that the words "subject to," &c., in the conveyance to the plaintiff, either operated as an exception, or, by reason of the execution of the deed by the plaintiff, as a regrant of the three acres to her vendor. In either case, therefore, the plaintiff was entitled to succeed.

Quære, also, if the deed operated as a regrant to W. G., whether if the lease were void, as contended, as creating a freehold interest to commence *in futuro*, W. G., having notice of his sisters' claim under it, would not be restrained from disturbing them. *Wilson v. Gilmer et al.*, 545.

Exemption from distress of lumber of stranger.—See DISTRESS, 1.

LEASE.

See LANDLORD AND TENANT, 1, 2.

LICENSES TO SELL LIQUOR.

See MUNICIPAL CORPORATIONS, 2—TAVERNS AND SHOPS, 2.

LICENSE COMMISSIONERS.

See TAVERNS AND SHOPS, 1—DEFAMATION.

LIMITATIONS (STATUTE OF)

1. *Tenancy of will—Entry—New trial.*—An entry upon land under assertion of right, and a verbal submission by the occupant, and consent

to remain as tenant to the owner, create a new tenancy at will, and give a fresh point of departure under the Statute of Limitations.

Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises, a new trial was granted. *Smith v. Keown et al.* 163.

2. *Ejectment—Mortgage—Statute of Limitations.*—Hugh O'Hare purchased the land in question, and took a deed dated 30th April, 1870. His brother James, the defendant, paid a small portion of the money, and immediately went into possession. Hugh occasionally visited the place. On the 30th November, 1874, Hugh mortgaged to the plaintiff, who issued his writ on 25th February, 1881.

Defendant claimed title by possession.

Held, that in any event the statute would not commence to run in defendant's favour until a year from his entry, and that he therefore had acquired no title. *Grant v. O'Hare*, 277.

3. *Survey—Conventional line—Statute of Limitations.*—The plaintiff owned the east three-quarters and the defendant the west quarter of lot 25, in the 11th concession of Euphrasia. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands. The parties cleared up to the line run by L. on each side of it, and a fence was gradually built along the line as the clearing proceeded, but did not extend through the lot, and had not all existed for more than ten years. The plaintiff had notified defendant that, if any of

his timber fell into the plaintiff's clearing, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links farther west than L.'s line. On this line the plaintiff erected a fence which the defendant took down, and the plaintiff brought trespass.

Held, ARMOUR, J., dissenting, that there was ample evidence of the defendant's possession of the land bounded by the line run by L., so as to entitle him to claim according to that line produced from front to rear of the lot, and a verdict in his favour was upheld.

Per ARMOUR, J., that adjoining proprietors cannot be bound by a line run between them, which is not the true line, except by such a contract as a Court of Equity would decree specific performance of: that here there was no evidence of any contract or intention to abide by L.'s line, whether it was a true line or not; and in such a case the statute will give a title only to such land as has been substantially enclosed for the whole of the statutory period.

Per HAGARTY, C. J., that apart from the statute, the evidence did not shew with sufficient clearness, as a matter of survey, that defendant had trespassed on his land. *Shepherdson v. McCullough*, 573.

MANDAMUS.

See CONVICTION, 1.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Negligence — Injury by fellow servant.—The plaintiff, being engaged in the service of the defendants in repairing a bridge, was injured by the fall of the hammer of a pile-driver, caused, as was found, by the negligence of one M. The work was being performed in R.'s section, R. being a councillor, and M., who was the reeve of the municipality, was employed at day wages by R. as foreman.

Held, that M., though reeve, was not acting in that capacity, but as a hired fellow servant with the plaintiff: that there was nothing to so identify the defendants with him in the work, as their chief officer, as to take the case out of the ordinary rule governing the relation of fellow servants; and that the plaintiff therefore could not recover. *Drew v. The Township of East Whitby*, 107.

See ARBITRATION, 3.

MEASURE OF DAMAGES.

See SHIPS AND SHIPPING.

MEMORANDA.

64, 182, 424.

MERGER.

See MORTGAGE, 2.

MORTGAGE.

1. *Growing crops, mortgage of—Mortgage of land—Distress clause—Right of mortgagee to distrain.*—A mortgage of land contained on attornment clause, and no provision ex-

pressly creating the relationship of landlord and tenant between the mortgagor and mortgagee, but it provided for possession by the mortgagor until default; that on default in payment of any one instalment for two months all should become due, and that on default in payment of any instalment the mortgagees might distrain therefor, and by distress warrant recover by way of rent reserved, as in the case of a demise of the said lands, so much as should be in arrear. The 1st instalment fell due on the 1st November, 1879, and the mortgagors being in possession, the mortgagees distrained therefor on the 6th October, 1880.

Held, that this right to distrain was a mere license, and did not warrant the taking of a stranger's goods upon the premises.

Semble, per CAMERON, J., that the mortgagors, on default, ceased to hold as tenants, and the distress therefore was illegal, as having been made more than six months after their term had expired.

The goods distrained were crops produced from the land after the 1st November, 1879, and the plaintiffs claimed them under a chattel mortgage given on 31st May, 1880, on such crops, which had then been just sown: *Held*, that the growing crops passed by the chattel mortgage to the plaintiffs, who were entitled to recover for them as against the defendants. *Lang et al. v. Ontario Loan and Savings Co.*, 114.

2. *Release of equity of redemption—Merger—Onus of proof—Action on covenant.*—The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the

plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiff his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon these points the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant.

Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co. v. Udell*, 511.

3. *Mortgage—Fixtures—Sale of—Burden of proof.*—S. mortgaged land upon which was a saw-mill, together with machinery, plant, trade, and other fixtures, to the Dominion Bank. He afterwards erected a drying-kiln with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in all the property mortgaged to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S.

Held, that *prima facie* the piping, being part of a building erected for the purpose of improving the inheritance, was a fixture, and passed to the mortgagees, either under their mortgage or the release; that the burden of showing that it was to continue chattel property, when put into the kiln, lay on the defendant; and that

the plaintiff therefore must succeed. *Burke v. Taylor*, 371.

MUNICIPAL CORPORATIONS.

1. *Alderman—Declaration of qualification—R. S. O. ch. 174, sec. 265—Quo warranto.*—The declaration required by the Municipal Act R. S. O. ch. 174, sec. 265, from every person elected under the Act to any office requiring a property qualification, is a pre-requisite to the discharge of the duties of such office.

Where an alderman elect did not state in his declaration the nature of his estate in or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada," *Held*, that the declaration was insufficient.

Held, also, that his right to the office on this ground, and for the want of a qualification at the time of his election, might be questioned by a *quo warranto* at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White v. Roach*, 18 U. C. R. 226, and *Kelly v. Maccarow*, 14 C. P. 457, distinguished.

Held, also, that the relator was not too late, having applied in the next Term after the election, and only one day after the time for moving under the statute. *Regina ex rel. Clancy v. St. Jean*, 77.

2. *Alderman—License to sell liquor—Disqualification.*—An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail,

is not disqualified under sec. 74 of the Municipal Act from holding the office of alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Acts.

The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that the defendant illegally exercised the franchises of the office. *Regina ex rel. Clancy v. Conway*, 85.

3. *Contested election—Acceptance of office—Qualification.*]—The acceptance of office by a mayor elect, referred to in R. S. O. ch. 174, sec. 180, within a month from which a writ of *quo warranto* to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification and office, and not a mere verbal acceptance by speech to the electors, or such like.

Linton v. Jackson, 2 Cham. R. 18, dissented from.

The defendant was not assessed for the year 1880, but in that year was assessed, on the 3rd September, for the year 1881, upon unincumbered leasehold property of the value of \$4,100. By by-law of the city of Ottawa this assessment was revised before the 15th November and returned before the 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected mayor of Ottawa on the 3rd January, 1881.

Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised

assessment at that time, within the meaning of the by-law and R. S. O. ch. 180, sec. 44, and the defendant could not qualify thereon. *Regina ex rel. Clancy v. McIntosh*, 98.

4. *Separation of townships—Arbitration—Omission to take and file notes of evidence*—R. S. O. ch. 174, secs. 383, 385.]—The provisions of sec. 383 of the Municipal Act requiring arbitrators to take and file for the information of the Court full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by themselves, or upon a view, in making their award, are imperative, and the omission to comply with them is fatal to the award.

From reading the award made in this matter, and the evidence and documents filed, it was impossible for the Court to ascertain the reason for the award, and so impossible to consider the matter upon the merits as required by sec. 385; and the evidence and documents which were filed appeared not to support the award, which was therefore set aside.

The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the Court refused to refer the matter back to them, but ordered that it be remitted to the Judge of the County Court, unless counsel could agree upon such facts as would enable the Court to deal with the matters in dispute. *In re Albemarle, et al.*, 183.

5. *By-law—Publication of—Adjoining municipality.*]—A proposed by-law of the township of Rochester, in the county of Essex, relating to drainage, was published in a newspaper in Windsor, a large town, and, for all other than judicial and muni-

cial business, practically the county town, and situate two miles from Sandwich, the county town. There was no newspaper published either in Rochester or in Sandwich, or in the next adjoining municipality; but there were papers published in several small villages, somewhat nearer the township of Rochester than Windsor, but their circulation was much smaller in Rochester than that of the Windsor paper.

Held, that the publication was sufficient; since if the words "adjoining local municipality," as used in 42 Vic. ch. 31, sec. 27, were construed "next adjoining, &c.," it would be impossible to publish the by-law as directed by the Act; and it did not form sufficient ground of objection thereto, that there were other papers a few miles nearer to Rochester than Windsor was. *Re Gallerno and Township of Rochester*, 279.

6. *Award between city and county*—*R. S. O. ch. 174, secs. 42, 445, 447*—*Discretion of arbitrators.*—In proceedings upon arbitration between a city and county under secs. 42, 445, 446, and 447 of the Municipal Act, the questions submitted are largely in the discretion of the arbitrators, no principle or rule being laid down by the statute. Where, therefore, arbitrators, in forming estimates of the proportion of expenditure to be borne by the city and county under these sections, took population as a basis instead of the assessment rolls, *Held*, that this was no ground for interference. The Court refused also to interfere with the compensation awarded for care and maintenance of prisoners.

The arbitrators having awarded as to the macadamized road lying in the county and city, a matter not

submitted to them, the clause was struck out of the award, with costs, which were fixed at \$10. *In re the Arbitration between the Corporation of the City of St. Catharines and the Corporation of the County of Lincoln*, 425.

7. *Municipal Act—Drainage by-law—Withdrawal of petitions—Alteration in work petitioned for.*—

A petition was presented under section 529 of the Municipal Act for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefited by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream, and some by informing the council that they would dig their own drains. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, shewing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law.

Held, that the by-law should be quashed; for (1) the council had no power to authorize the undertaking of any work other than that petitioned for, and if that was impracticable or too costly they should have refused the petition; (2) the petitioners had the right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, *i.e.*, while the council had control of the matters, the preliminary surveys and estimates being as much for the information of the petitioners as of the council; (3) a sufficient number of petitioners having withdrawn to reduce the number below the majority of those to be benefited, the by-law untruly recited that a majority, &c., had petitioned. *Re Misener v. The Township of Wainfleet*, 457.

8. *Flooding by sewer—Liability of corporation—Proof of negligence—New trial.*]—The plaintiff leased premises at the corner of Queen and Bathurst streets, which ran at right angles to each other, in Toronto. There was a main sewer on Queen street, with which plaintiff's private drain, constructed by the defendants at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein, at or about Portland street, a wall, said to be for the purpose of dividing the water and causing it to flow eastward and westward. There was a sewer on Bathurst street, south of Queen street. Subsequently, and about four years before the action, a sewer was constructed on Bathurst street, north of Queen street. Into this sewer a creek was turned, in which at times the water was six feet deep; and a number of cross streets drained thereinto. Within the four

years before action, but never before, the plaintiff's cellar had been flooded several times, and the cause of this action was the flooding during a steady rain of eight or nine hours duration. The plaintiff alleged originally defective construction of sewers, and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him. A new trial was directed, *ARMOUR, J.*, dissenting.

Per HAGARTY, C.J., and *CAMERON, J.* The mere proof of the flooding did not establish a *primâ facie* case of negligence against the defendants; a specific ground of negligence must be proved, and there was no sufficient evidence of position, connection, capacity, and levels of the sewers on Queen and Bathurst streets.

Per CAMERON, J.—Remarks as to the difference in the liability of, or injuries caused by sewers and by highways.

Per ARMOUR, J.—The fact of the flooding of sewers constructed, controlled and managed by the defendants, was *primâ facie* evidence of negligence; but the fact that no flooding had occurred before the construction of the Bathurst street sewer north of Queen street, coupled with the evidence, was sufficient to shew *primâ facie* that the sewer brought down more water than the Queen street sewer, and Bathurst street sewers, south of Queen street, were capable of carrying away rapidly enough, and that the plaintiff was entitled to recover. *Noble v. The City of Toronto*, 519.

9. *Quo warranto—Municipal election—Jurisdiction of C. C. Judge.*]—A County Court Judge directed the issue of writs of *quo warranto*, returnable before himself, to test the

validity of a municipal election, but before appearance set aside all proceedings for irregularity with costs, on exceptions to the writs taken before him.

Held, CAMERON, J., dissenting, affirming the judgment of HAGARTY, C. J., that he had power so to do. *Regina ex rel. Grant v. Coleman*, 175.

See DEDICATION—MASTER AND SERVANT—ARBITRATION, 3.

MUNICIPAL ELECTION.

See MUNICIPAL CORPORATIONS, 9.

NEGLIGENCE.

See MASTER AND SERVANT—MUNICIPAL CORPORATIONS, 8.

NEW TRIAL.

See LIMITATIONS (STATUTE OF), 1—MUNICIPAL CORPORATIONS, 9.

ONUS PROBANDI.

See MORTGAGE, 2, 3.

PAYMENT.

See GUARANTY.

PLEADING.

Though each paragraph of a statement of the defence should, under Rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence. *The Union Fire Insurance Co. v. Lyman*, 453.

See CONSTITUTIONAL LAW, 2.

PRINCIPAL AND SURETY.

Promissory note—Principal and surety—Payment by surety—Rights of surety.]—The M. manufacturing company, in the usual course of their business, took from agents notes for machines supplied to them, which were transferred by the M. company as collateral security to a bank where they had a line of credit. The agreement with the agents was that, upon their substituting their customers' notes for their own, they were entitled to the delivery up of the latter. The defendant, who was the agent, had given notes for machines supplied him, which were handed to the bank by the company. He afterwards transferred to the company a large number of his customers' notes.

The bank manager finding some of the defendant's notes overdue, demanded that they should be replaced by fresh paper, and the company then applied to the defendant, who gave the notes sued on without getting an adjustment of accounts between them, though there was but a small balance due to the company; and these notes were transferred to the bank and the old notes given up. The M. company got into difficulties, and the bank sued B., their president, and another who, jointly with the M. company, had guaranteed the company's account to the extent of \$50,000. B., in order to protect himself, resigned the presidency, and undertook to pay off the company's indebtedness to the bank, and take all their securities. A resolution of the board was passed approving of this, and the M. company directed the bank to transfer to B. the company's securities on payment. B. applied to the plaintiff for the money, and advanced the requisite amount, having obtained the same by pledg-

ing stock and other securities to a loan company, and took all the notes held by the bank to hold for collection to pay expenses, repay the advances, pay their indebtedness to the loan company, and to account to B. The notes sued on were amongst those transferred to the plaintiff, who took them without notice of their character, or the state of the account between the defendant and the M. company.

Held, that he stood in the place of the bank, and succeeded to all its rights, and that the defendant was liable to the full amount of his notes in the plaintiff's hands. *Cowan v. Doolittle*, 398.

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PUBLIC SCHOOLS.

*Loan for proposed school-house—Submission to electors—Sufficiency of—*42 Vic., ch. 34, sec. 29, sub-sec. 3.]—It appeared from the affidavit of the secretary and treasurer of a school section, that at two regularly called meetings of the duly qualified electors of a school section at which a chairman was appointed, proposals to purchase a site, build a school-house, and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed, authorizing the issue of debentures to raise money for the above purposes.

Held, that under 42 Vic., ch. 34, sec. 29, sub-sec. 3, this was a sufficient submission to and approval of the proposal by the duly qualified school-electors of the section, and a

rule to quash the by-law was discharged. *In re McCormick and the Township of Colchester South*, 65.

QUO WARRANTO

Power of County Judge to set aside.]—See MUNICIPAL CORPORATIONS, 9.

See MUNICIPAL CORPORATIONS, 1.

RAILWAYS.

See CONSTITUTIONAL LAW, 2.

REFERENCE.

An appeal lies from an award made in pursuance of a consent order of reference in a cause at nisi prius under sec. 205, R. S. O. ch. 50.]—See ARBITRATION, 2.

REPLEVIN.

See ATTACHMENT.

RESCISSION.

See FRAUD.

RESERVATION.

See DEED—LANDLORD AND TENANT, 2.

REVIEW.

Court no power of, in case of decision by Sessions.]—See CONVICTION, 2.

ROADS.

Road company—Tolls—Repairs—
R. S. O. ch. 152.]—Under “The General Road Companies Act,” *R. S. O. ch. 152*, secs. 102, 104, 109, the first engineer appointed to examine a road alleged to be out of repair, must act throughout the proceeding unless another is appointed under, sec. 109; but under that section the Judge is the person to be satisfied that the first engineer is unable to make or complete the examination, and his decision on that point cannot be reviewed.

The engineer appointed under the Act need possess no official certificate or degree.

The second engineer having been appointed in January to examine and report “as to the present condition of the road” made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer had been performed, as it was covered with snow. In May following, without any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls.

Held, that he was *functus officio* after the first examination, and that the tolls therefore were illegally imposed. *Regina v. Greaves*, 200.

 RULES OF COURT.

495.

 SALE OF GOODS.

1. *Condition as to re-sale—Statute of Frauds—Amendment.*]—Defendant sold to plaintiffs a quantity of tea, agreeing that if there was any left on plaintiffs’ hands at a certain

date, he would take it back at the advanced price of ten cents per pound. *Held*, an entire agreement consisting of one conditional contract of sale, and not of two contracts; and that consequently the delivery of the goods by the defendant satisfied the Statute of Frauds, and the plaintiffs were entitled to recover for the defendant’s refusal to take back the quantity left unsold.

The plaintiffs applied at the trial to amend their declaration by striking out a term of the bargain therein alleged, but not proved, that the plaintiffs would sell as much of the tea as they could. *Held*, an amendment which was imperative under *R. S. O. ch. 50*, sec. 270. *Lumsden et al. v. Davis*, 1.

2. *Sale of goods “to arrive”—Construction of.*]—A contract for the sale of goods “to arrive” does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods, except perhaps where the goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner.

In this case, being a sale of iron to be made in Scotland, it was held, upon the evidence set out below, that the sale was absolute, and not subject to any condition as to arrival of the goods. *Fleury v. Copland et al.*, 36.

3. *Contract by letters and telegrams—Condition precedent—Waiver.*]—By telegrams and letters the defendant offered to sell the the plaintiff twelve cars of barley, to be delivered free on the track in Toronto, at sixty-six cents per bushel, of the quality of two cars previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff

at his own expense at Lansdowne. The plaintiff telegraphed, "All right, will take the lot. Ship one car on receipt—quick." By letter of same date the plaintiff said that this might save the necessity of his sending down to inspect, as if this car was all right he need not do so. The car was sent by the defendant, who, however, wrote at once, when advising of the shipment, that the only way he would sell would be to have the barley inspected at his grain house. Defendant drew on the plaintiff for the price of the car sent, which was paid. The plaintiff did not inspect, but after receiving this car, the plaintiff wrote and telegraphed to defendant to ship the balance, but defendant refused to do so.

Held, (Cameron, J., diss.,) that the contract was subject to the condition stipulated for by the defendant, that the plaintiff should inspect before shipment; and that the shipment of one car, with the letter accompanying it, was not a waiver of the condition for inspection at Lansdowne of the residue, which the defendant was therefore not bound to deliver. *Goodall v. Smith*, 388.

SCHOOLS.

See PUBLIC SCHOOLS.

SESSIONS.

1. *Illegal issue of license—Conviction—Certiorari.*—A *certiorari* will not lie to remove a conviction under "The Liquor License Act," R. S. O., ch. 181, sec. 48, which has been affirmed and amended on appeal to the sessions, for issuing a license contrary to the said Act, the procedure being regulated by 32-33 Vic.

ch. 31, sec. 71, (D), as amended by 33 Vic. ch. 27, sec. 2 (D.) *Regina v. Grainger*, 196.

2. *Conviction—Appeal to Sessions—Right to a jury*—32-33 Vic. cap. 31-36, Vic. cap. 58, sec. 2—*Construction of Statutes—New evidence—Irregularity.*—On an appeal to the Sessions from a conviction by a magistrate for breach of a municipal by-law, it is in the discretion of the chairman to grant or refuse a request for a jury, under 36 Vic. cap. 58, sec. 2, which is declaratory of the meaning of sec. 66 of the 32-33 Vic. ch. 31, and is not confined to cases under the Acts mentioned in the preamble and title, which relates only to the desertion of seamen.

Remarks as to embracing in one Act several subjects which are not expressed in the title; and as to the effect of the title and preamble of a statute as guides to the construction.

The by-law mentioned in this conviction was not put in or proved at hearing before magistrate, or at the first hearing on the appeal, but was put in at the adjourned hearing: *Held*, sufficient.

On the appeal the appellant tendered evidence and witnesses not heard on the trial before the magistrate which the chairman rejected, relying on 32-33 Vic. ch. 31, sec. 66, which, however, had been repealed by 42 Vic. 44, sec. 18. The conviction was amended and affirmed, as and for a breach of a municipal by-law.

Held, that the appellant had the right, under either the Dominion Act, or R. S. O. ch. 74, sec. 4, which governed the case, to have such witnesses examined, and having been deprived of this right, the order of Sessions should be quashed.

The original conviction was for "acting in a disorderly manner by

fighting, and breaking the peace, contrary to the by-law and statute in that behalf;" imprisonment with hard labour was imposed in default of payment of the fine, and the costs were made payable in the alternative to the magistrate or the prosecutor. *Held*, bad.

Held, also, following *Re Bates*, 40 U. C. R. 284, that the conviction being for breach of a by-law, the writ of *certiorari* was not taken away by R. S. O. ch, 74. *Regina v. Washington*, 221.

See CONVICTION, 1.

SET-OFF.

Verdict—Judgment—Set-off.—The plaintiff had recovered a verdict for \$600 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same Assizes the defendant recovered a verdict against the plaintiff for \$380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the Court held this to be a device to prevent a set-off.

Held, that the defendant was entitled to have the plaintiff's verdict set off *pro tanto* by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff. *Grant v. McAlpine*, 284.

SEWERS.

See MUNICIPAL CORPORATIONS, 8.

SHERIFF.

Attachment for obstructing, will not be granted where parties punished by police magistrate under 32-33 Vic., ch. 32.—See ATTACHMENT.

SHIPS AND SHIPPING.

On the 3rd October the plaintiff chartered the defendant's vessel the "Erie Belle," to carry salt from Goderich to Milwaukee, for 75 cents a ton, the effect of the contract being, that the vessel was to load and carry within a reasonable time. On the 11th October defendant telegraphed, "Erie Bell cannot go, will you take Steam Barge as substitute, answer quick." Some subsequent correspondence took place, the plaintiff holding the defendant to his contract, and the defendant agreeing to perform it. At this time the plaintiff could have got a vessel at \$1.00, but waited for the defendant's vessel, which was loaded on the 25th November, when the master fearing bad weather, refused to sale, and it was impossible to charter another vessel. The plaintiff who had sold the salt in Milwaukee, sent part by rail, and paid his consignee the difference in price between salt which he had to buy and the contract price. The freight by rail was \$3.50 per ton, and 50 cents had to be paid for cartage, which would have been unnecessary had the salt gone by defendant's vessel.

Held, on appeal from the arbitrator, that the defendant was not entitled to hold the plaintiff to the damages which he might have recovered had he chartered a vessel at \$1.00 after the telegram of the 11th October, for that telegram, taken in connection with the subsequent cor-

respondence, did not shew an absolute refusal to perform the contract on which the plaintiff was bound to act; but that the plaintiff was entitled to recover the difference in price paid to his consignee, the difference in the freight, and the amount paid for cartage. *McEwan v. McLeod*, 235.

SQUARE.

See DEDICATION.

STATUTE OF FRAUDS.

See SALE OF GOODS, 1.

STATUTES (CONSTRUCTION OF).

32-33 *Vic. ch. 31, sec. 66, D.*]—See SESSIONS, 2.

R. S. O. ch. 50, sec. 270.]—See SALE OF GOODS, 1.—ARBITRATION, 1.

R. S. O. ch. 50, sec. 205.]—See ARBITRATION, 2.

R. S. O. ch. 74, sec.]—See SESSIONS, 2.

R. S. O. ch. 119, sec. 10.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

R. S. O. ch. 125, sec. 7.]—See HUSBAND AND WIFE.

R. S. O. ch. 152, secs. 102, 104, 109.]—See ROADS.

R. S. O. ch. 174, secs. 44, 180.]—See MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 174, sec. 74.]—See MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 174, sec. 265.]—See MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 174, sec. 383.]—See MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 174, secs. 42, 445, 446, 447.]—See MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 181, sec. 48.]—See SESSIONS, 1.

36 *Vic. ch. 58, sec. 2, D.*]—See SESSIONS, 2.

42 *Vic. ch. 31, sec. 27.*]—See MUNICIPAL CORPORATIONS, 5.

42 *Vic. ch. 34, sec. 29, sub-sec. 3.*]—See PUBLIC SCHOOLS.

43 *Vic. ch. 37, D.*]—See CRIMINAL LAW, 2.

STATUTE LABOUR.

See ASSESSMENT AND TAXES.

STOCK.

See CORPORATIONS.

SUPERIOR COURT.

See CONVICTION, 2.

SURETY.

See PRINCIPAL AND SURETY.

SURVEY.

See LIMITATIONS (STATUTE OF), 3.

TARIFF.

See RULES OF COURT.

TAVERNS AND SHOPS.

1. *License Commissioners' resolutions—Infringement of—Delegation of legislative powers—Constitution—*

ality of.]—The Board of License Commissioners for Toronto acting under ss. 3, 4, and 5, of R. S. O. cap. 181, passed resolutions to the effect that no licensed victualler should sell any intoxicating liquor, &c., to any child apparently under the age of fourteen years, &c., and should not suffer any billiard table, &c., to be used in his tavern during the time prohibited by the Liquor License Act or by the resolution for the sale of liquor therein, and that any person infringing these resolutions should pay a penalty of \$20, to be levied by distress, and in default be imprisoned for fifteen days. The defendant having been convicted for breach of these resolutions,

Held, that the conviction was bad ; for that the Legislature of Ontario had no power to delegate its authority and enable the License Commissioners to create new offences, and provide for punishing them. *Regina v. Hodge*, 141.

2. *Liquor License Act—Sale of the licensed premises—Conviction.*—The defendant was licensed to sell “in and upon the premises known as the Palmer House.” The Palmer House stood upon the front part of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground, immediately within which enclosure the defendant sold liquor, for which he was convicted.

Held, that as the ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the

hotel, it was not covered by the license, and the conviction was right. *Regina v. Palmer*, 262.

See DEFAMATION — MUNICIPAL CORPORATIONS, 2.

TOLLS.

See ROADS.

ULTRA VIRES.

See DEFAMATION.

WAIVER.

See SALE OF GOODS, 3—INSURANCE, 1.

WATER AND WATER-COURSES.

See MUNICIPAL CORPORATIONS, 8.

WITNESSES & EVIDENCE.

Witnesses on an arbitration must be examined on oath.—See ARBITRATION, 1.

See CRIMINAL LAW, 1, 2—MUNICIPAL CORPORATIONS, 8.

WORDS.

Contract for sale of goods “to arrive.”—See SALE OF GOODS, 2.

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